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HABILITATIO

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COMMUNICATIO

ON CERTAIN ASPECTS OF PRIVACY*

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1. Aspects of privacy have come to the forefront of interest both for the public and in the legal literature in recent decades. We dispense with a historical discussion of the issue and are content by mentioning that the chapter on privacy in the Hungarian Civil Code (1959) was all but confined to retelling what the Constitution said of the matter. The reasoning the minister of justice of the time put forward in connection with the bill of the law on the Civil Code was silent on human rights and did not elaborate on the constitutional foundations of privacy. All it said was the Civil Code treated privacy the way the Constitution did and mentioned in passing the instruments of administrative law and criminal law to protect privacy. The provisions the Civil Code offered were little more than paying lip service, as was typical of the treatment of human rights in that era.

When the Civil Code was amended in 1977, the provisions on privacy were expanded and strengthened, which reflected the change in the political climate. In a monograph written on privacy in 1983 László Sólyom described the amendment as a „major and spectacular re-regulation."[1] The reasoning the minister of justice of the time put forward, when the bill was debated in Parliament emphasized the protection of the fundamental rights of citizens. Political opening in private law apparently outpaced that in public law, just as in other matters.

The 1977 amendment acknowledged the consequences of technological progress: the growing role of the media by including provisions on libel suits, and the impact of the use of computers on privacy by including provisions on the registration of personal data in computers.

The present study discusses the impact on privacy of the consequences of technological progress, and the relationship between privacy and human rights, privacy and constitutional law.

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* Let me express my thanks to Annamária Klára and Dobromir Mikhailov for their precious assistance to collecting materials for this paper.

1 László Sólyom: *A személyiségi jogok elmélete* [A Theory of Privacy], Budapest, Közgazdasági és Jogi Könyvkiadó, 1983, p. 13.

2. Conditions radically changed in Hungary following the change of the political system, and evident is the question how should the Civil Code regulate privacy in the new situation?

In a clear departure from the Civil Code of 1959, the present provisions do not just pay lip service to the protection of human rights. The provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms have become important components of the Hungarian legal system. During the transition the fundamental rights were adjusted in the Hungarian Constitution to the Covenant and the Convention, and those considerations shaped the practice of the Constitutional Court when granting constitutional protection to fundamental rights.

In Hungarian constitutional law the human rights have assumed a new role. Consequently, the rules that were incorporated in the laws of various fields of law before the transition-related amendments of the Constitution need to be revised. Let us give you an example. It is questionable, whether the Civil Code should declare the protection of political rights, while no civil law rules are attached to those rights. Though the violation of those rights incurs tort liability, damage caused illegally could be established even if the Civil Code did not provide for the protection of those rights. Given the changes that have occurred over the past few decades, certain fundamental issues of regulation need to be overhauled.

3. Present conditions are very different from those in 1959 or for that matter in 1977 in terms of technological progress, the advance of biology, and the commercial utilization of those results. The demand for the protection of privacy in health care and for the protection of private and trade secrets require the modernization of the regulation. Such changes have directed attention to privacy both in international legal practice and legal literature. The protection and regulation of privacy varies from country to country.[2] Even the European Union finds it challenging to respond to the impact of technological progress on privacy, especially as regards the key role of information networks in economy. That is why prestigious legal experts have called for a new regulation system.[3]

The present paper sheds light on some aspects of this complex issue without going into detail.

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[2] Ansgar Ohly: Harmonisierung des Persönlichkeitsrechts durch den Europäischen Gerichtshof für Menschenrechte? *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* 2004, Heft 11, p. 903.

[3] Ph. Alston and J. H. H. Weiler: An 'ever closer union' in need of a human rights policy: The European Union and human rights, in: Philip Alston (ed.), *The EU and Human Rights*, Oxford Univ. P., Oxford – New York 1999, p. 17.

4. Many new issues of privacy have arisen due to technological progress over the past decades. Take the example of new information networks. Today personal data are processed on a large scale, access to processed data has become easy, data controller often pass on data, and personal data are used for business and other purposes in daily routine. In fact, personal data have become a commodity, and a market emerged for them.[4]

Data protection apart, American legal journals carry conflicting views about privacy, especially in health care: donation of blood, the transplantation of organs and tissues, etc. There is disagreement on whether property rights apply to the human body, whether the exercise of rights may be commercialized as, for instance, to transfer certain rights or consent to abstaining from the exercise of certain rights – or the government should intervene and, invoking other than business considerations, restrict those rights to protect the individual (even if the person concerned opposes that).[5]

Numerous American experts argue in favour of a commercial approach and claim that ownership should prevail, even if that gives rise to unconventional proprietary categories. By contrast, other experts claim that legal regulation should be based on other than market considerations. I find the argument convincing that legal means on their own cannot be sufficient either way.[6]

The European legal approach is different, even if the business potentials of personal data are equally acknowledged. The relevant European rules focus on non-commercial considerations because of the intention to be safe against terror attacks, which Europe has been occasionally experiencing for a long time. Note that after the events of 11 September 2001, the relevant American rules also underwent substantial changes. A massive centralized network was built to survey data traffic and the relevant legal instruments were put in place.[7]

5. The way Hungarian civil law regulates this area is closely related to the approach of the Council of Europe and the European Union. The framers of the instruments of Hungarian civil law have studied the relevant international conventions, the relevant national laws and judicial practice. The author of this paper has the impression that those factors have not been sufficiently examined so far.

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4 Paul M. Schwartz: Property, Privacy and Personal Data, *Harvard Law Review* 2004, pp. 2056-2057.

5 Susan Rose-Ackerman: Inalienability and the Theory of Property Rights, *Columbia Law Review* 1985. 945 and later pages; pp. 968-969.

6 Pamela Samuelson: Privacy as Intellectual Property? *Stanford Law Review* 2000, pp. 1126-1130.

7 Michael Levi, David S. Wall: Technologies, Security, and Privacy in the Post-9/11 European Information Society, *Journal of Law and Society* 2004, pp. 196-201.

(a) Country-level data protection was augmented on 21 January 1981, when Member States of the Council of Europe signed the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.[8] Numerous recommendations were issued later on about the various aspects of that complex issue. That development prompted experts to call for an entirely new regulation approach, some sort of a novel Code Napoleon or BGB to protect privacy.[9]

It is not the purpose of this paper to analyse that convention. Suffice it to mention that – just like other similar instruments – the convention had to balance between two conflicting requirements. The last paragraph of the Preamble provides that it „is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information." The convention does not directly bestow rights on the individuals concerned, as implementation is the duty of the signatories by enacting national legislation in compliance with the convention. Paragraph 2 of Article 12 provides that „A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party." Let me stress the importance for civil law of paragraph 1 of Article 3, which provides: „The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors." That provision requires the framing of rules that have an effect both in the vertical relations between citizen and state and the horizontal relations between citizens.

The reasoning put forward in Parliament during the debate of the bill of Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest states that the law complies with the data protection convention of the Council of Europe. Article 83 of the Hungarian Civil Code only stipulates: „Data management and data processing by computer or other means may not violate privacy", and adds some other important provisions. However, a detailed regulation of that area can be found in other rules of law. That having said, the sanctions enumerated by Article 84 of the Civil Code may be applied to all cases of violation of privacy.

(b) The countries of Europe formulated their data protection laws one after the other as from the 1970s. Although they were based on the said convention of the Council of Europe, their content was far from identical. The need for some kind of a common regulation was soon recognized in the countries of the European Economic Community. The European Parliament called for the elabora-

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[8] ETS No. 108.

[9] Herbert Burkert: Progrès technologique, protection de la vie privée et responsabilité politique, *Revue française d'administration publique* 1999, pp. 119-120., p.124.

tion of rules that protect privacy from 1976 on. Among the factors calling for such Community legislation were the on-going exchange of information under the Schengen Agreement, the fast growth of the information market and the stupendous evolution of data recording and forwarding techniques.[10]

Following prolonged rounds of preparatory work, the European Parliament and the Council promulgated Directive 95/46/EC.[11] That directive was followed by several other, specialized instruments.[12] It is worth mentioning among them the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)[13], and the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector.[14]

Hungarian rules of law have been adopted in compliance with those directives but it needs to be examined, whether their relation to the general rules of privacy has been clarified.[15] That is why this paper raises some related questions.

Paragraphs 7 and 8 of the Preamble of Directive 95/46/EC clearly states the purpose of Community-level regulation: the Member States use different legal instruments to regulate the protection of privacy in connection with the processing of personal data, and those differences can obstruct the transmission of such data from one Member State to the other, can distort competition and disturb the operation of an internal market. In addition to the enforcement of the requirements of the internal market and the free flow of information, paragraph 3 of the Preamble calls for the safeguarding of fundamental rights of individuals. Paragraph 10 of the Preamble stipulates that the approximation of laws based on that directive must not result in any lessening of the protection the Member States afford.

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[10] Ulf Brühann: La directive européenne relative à la protection des données : fondements, histoire, points forts, *Revue française d'administration publique* 1999, pp. 12-14.

[11] OJ L 281, 23 November 1995, 31.

[12] For a survey of the question in Hungarian, *see* Paulina Oros and Kinga Szurday: Adatvédelem az Európai Unióban [Data Protection in the European Union], *Európai Füzetek*, no. 35, issued in 2003.

[13] OJ L 108, 24 April 2002, 33.

[14] OJ L 201, 31 July 2002, 37.

[15] *See* a related paper by György Zsolt Balogh: Az adatvédelmi törvény fejlesztésének kérdései [Aspects of the Development of the Law on Data Protection], *Jogtudományi Közlöny* 1997, pp. 271, 275; on the relationship to the freedom of information, *see* a contribution by Iván Székely in the discussions section of *Fundamentum*, 2004, pp. 53-54.

The primary purpose of the Hungarian Constitution and the Civil Code in the regulation of the rights to privacy is to protect privacy and not to remove obstacles from the way of the free flow of personal data.[16] The difference in approach may cause problems in enforcement.

The principles of the Directive are similar to those of the Convention signed by the Member States of the Council of Europe. The Directive defines the main principles that the legal instruments to be adopted by the Member States should follow. Paragraph 2 of Article 1 provides that the Member States shall neither restrict nor prohibit the free flow of personal data between Member States, for reasons connected to the protection of the rights to privacy. Item (a) of Article 7 stipulates that the Member States "shall provide that personal data may be processed only if the data subject has unambiguously given his consent", yet it offers several exemptions to that principle. Article 5 obliges the Member States to issue legislation to determine the conditions under which the processing of personal data is lawful, yet the Directive includes the common conditions to be adhered to.

As has been mentioned, item (a) of Article 7 states that personal data may only be processed if the data subject has given his consent. Subsequent provisions of Article 7 seem to be different from the underlying principles of Article 83 of the Civil Code and Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest. Personal data may be processed without the consent of the data subject, if processing is necessary for the performance of a contract to which the data subject is party (item [b] of Article 7), or processing is necessary for compliance with a legal obligation, to which the controller is subject (item [c] of Article 7). There is another provision that differs from the Hungarian Civil Code. Item (f) of Article 7 stipulates that data processing may take place without the data subject's consent, if processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties, to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject, which require protection.

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[16] In his analysis of the relation between the Civil Code and the Constitution, László Majtényi states that the two instruments are not consistent in using certain categories, and Gábor Jobbágyi expresses dissatisfaction over the absence of a clear definition of the protection of the individual's rights in civil law. *See* László Majtényi: Az adatvédelem és az információszabadság az Alkotmányban [Data Protection and the Freedom of Information in the Constitution], *Acta Humana* 1995. no. 18-19. p. 97; Gábor Jóbbágyi: Az ember és az emberi személyiség az új Polgári Törvénykönyvben [Man and Human Personality in the New Civil Code], *Jogtudományi Közlöny* 2000, pp. 262-263.

There was some uncertainty in the implementation of the Directive. For that reason the consolidated version of the Treaty on European Union, which incorporated the Treaty of Amsterdam, stipulated that the Community institutions set up on the basis of the Treaty shall enforce the Community rules on the protection of personal data and the flow of data, and it called for the establishment of an institution that would inspect adherence to the rules of data protection. Because of the problems in the implementation of European Union legislation, it was required to compile a consolidated text of the disparate array of specialized rules.[17]

The scope of this paper only allows us to mention briefly that Community legislation may not be subjected to judicial review, even if the protection of human rights is at stake. The European Court of Justice confirmed in a decision it handed down in 2004 that neither a natural, nor a legal person might institute proceedings against a general norm because paragraph 4 of Article 230 of the Treaty on European Union does not allow scope for that.[18] The judicial decision on that long-debated issue elicited instant responses outside Hungary,[19] and Hungarian legal experts have yet to analyse them.

In 2000 the Parliament, Commission and Council of the European Union adopted the European Union's Charter of Fundamental Rights.[20] The first Article of the Charter states that „Human dignity is inviolable." The modified commentary attached to the Charter emphasizes that human dignity is the foundation of human rights, and none of the rights enunciated in the Charter may violate human dignity. Even in cases, when fundamental rights need to be restricted, human dignity must be honoured. Paragraph (1) of Article 8 of the Charter provides that „Everyone has the right to the protection of personal data concerning him or her." The second paragraph adds that „Such data must be processed fairly for specified purposes, and on the basis of the consent of the person concerned, or some other legitimate basis laid down by law." The commentary on the Charter says that Article 8 was written on the basis of the relevant convention of the Council of Europe, directives of the European Union

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[17] Francesco Maiani: Le cadre réglementaire des traitements des données personnelles effectués au sein de l'Union européenne, *Revue Trimestrielle de Droit Européen* 2002, pp. 298-299.

[18] Commission des Communautés européennes contre Jégo-Quéré & Cie SA, C-263/02, decision of 1 April 2004, item 30.

[19] Some examples: Jürgen Schwarze: The Legal Protection of the Individual against Regulations in the European Union Law, *European Public Law* 2004, pp. 285-303; Christopher Brown, John Morijn: Case C-263/02 P, Commission v. Jégo-Quéré & Cie SA, *Common Market Law Review* 2004, pp. 1639-1659.

[20] For a comprehensive review of the Charter, *see* Mónika Weller: Az Európai Unió Alapjogi Kartája [Charter of Fundamental Rights of the European Union], *Acta Humana*, 2001, no. 43. pp. 31-44.

and relevant practice of the European Court of Justice. Having read the reference to the convention of the Council of Europe, we cannot be surprised to see that the commentary is not content with speaking of the protection of human rights, but also of the options for restricting the rights to privacy, as laid down in certain instruments of Community legislation.

Experts disagree about the legal evaluation of the Charter. Even though the Charter has no binding force, several Advocates-General have qualified the charter as belonging to the common constitutional heritage of the Member States and it is supposed to be enforced as such. The European Court of Justice has not embraced that opinion so far in its practice.[21] The charter has been incorporated into the draft Constitution of the European Union. In case the Member States adopted the draft Constitution and it became effective, the present legal character of the charter would change.

6. Questions of data protection have repeatedly come up in the practice of the Hungarian Constitutional Court,[22] and the fast technological progress and the developments in the regulation of related matters abroad have generated considerable interest.[23] When Hungarian experts discuss related domestic issues, they seem to focus on the Convention of the Council of Europe.[24] Several judicial decisions have recently been made that are important because of their civil law ramifications. In the passage below we offer a survey of those judicial decisions.

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[21] Franz C. Mayer, La Charte européenne des droits fondamentaux et la Constitution européenne, *Revue Trimestrielle de Droit Européen* 39 (2) 2003, pp. 192-193.

[22] *See* László Sólyom: *Az alkotmánybíráskodás kezdetei Magyarországon* [Early Stages in the Work of the Constitutional Court in Hungary], Budapest 2001, pp. 463-474, which presents the historical context as well; furthermore, an analysis by István Kukorelli in: Zsolt Balogh, András Holló, István Kukorelli, János Sári: *Az Alkotmány magyarázata* [An Explanation to the Constitution], Budapest 2002, pp. 577-586.

[23] Recent writings as published in issue no. 4 of *Fundamentum* 2004: László Majtényi: Az elektronikus információszabadság törvénybeiktatása [How the Freedom of Electronic Information Became Law], Zsuzsa Kerekes: Az információszabadság az Európai Unióban [The Freedom of Information in the European Union], Máté Dániel Szabó: Elektronikus információszabadság külföldön [The Freedom of Electronic Information outside Hungary]

[24] Kinga Szurday: Az adatvédelmi jogi szabályozás szerepe, feladatai és hatása a közigazgatásra és a versenyszférára [Legislation on the Data Protection and its Role, Tasks and Impact on Public Administration and the Private Sector], *Magyar Jog* 1994, pp. 661-665; László Majtényi: A személyes adatok védelméhez való jog [The Right to Protection of Privacy], in: Gábor Halmai, Gábor Attila Tóth (ed.): *Emberi jogok* [Human Rights], Budapest 2003, pp. 585-595.

7. An example is the decision of the European Court of Justice on data made public by the Austrian Court of Audit.[25] Before discussing the details of the case, let us consider some background information. The Constitution of Austria exercises control over the pay of civil servants by obliging certain employers to inform the Austrian Court of Audit about any salary or pension paid above the sum defined by the compulsory wage scale. The Court of Audit is legally obliged to make those data public. However, the persons affected took their employer to court for making public their personal data without their consent, and the employer took legal action against the Court of Audit. Then the Austrian Constitutional Court and the Austrian Supreme Court referred for preliminary ruling the interpretation of the above-mentioned Directive 95/46/EC to the European Court of Justice.

Item 39 of the Court's decision provides that, taking Directive 95/46 as basis, the Member States must adopt legislation that ensures the unobstructed flow of data between the Member States. Item 42 stipulates that the application of the Directive may not be subject of the Member States weighing, whether the facts of the case are related to the exercise of the four freedoms. Consequently, the Court expects the Member States to assert the provisions of the Directive by relying to a large extent on their national legislation.

What the court ruling says of the right to privacy is of major importance. Item 68 stipulates that the provisions of the Directive must be interpreted by taking the protection of fundamental rights as basis, if data processing endangers the protection of privacy. Though the Directive intends to promote the free flow of data, it calls on the Member States to defend the fundamental rights, especially the private secrets of individuals, when personal data are processed (item 70).

It is interesting that the court ruling repeatedly refers to the practice of the European Court of Human Rights (items 73, 77 and 83). By doing so, it expresses the intention to establish and maintain coordination between the activities of the two judicial institutions.

Another interesting component of the decision is that it examines, whether a provision of the Austrian Constitution is compatible with Community law. The European Court of Justice honours the Constitution of the Member State concerned: it restrains from directly voicing an opinion about it. However, it calls on the Austrian court concerned to decide, whether or not the provision concerned violates human rights (item 79). What it says is an indirect taking of sides though, because it defines the criteria of adjudication and it almost sug-

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[25] Judicial decisions made in the following cases: *Rechnungshof* v. *Österreichischer Rundfunk and others* C-465/00, *Christa Neukomm* v. *Österreichischer Rundfunk* C-138/01, furthermore, *Joseph Lauermann* v. *Österreichischer Rundfunk* C-139/01 (20 May 2003)

gests a decision, because it calls for the examination whether it is necessary to make public the names of the persons concerned to attain a goal, which is common interest by the way (item 90).

Though the decision of the European Court of Justice concerned is relatively recent, there have been responses to it in legal literature. An article, which is relevant to the subject of this paper, says that the European Court of Justice insists on that the Member State concerned must adhere to the fundamental rights that are recognized by the European Union, even in the course of applying its national legislation. In the past such expectation was only expressed, when Community law was enforced. Thus the European Court of Justice examines the national legislation of Member States with reference to the assertion of the fundamental freedoms and, by doing so, it inspects whether fundamental rights are duly protected.[26]

Another article says that the court decision gives very broad interpretation of the Directive's scope of application.[27] Claus Dieter Classen's opinion coincides with the previous comments. He is critical of the court decision on several grounds. In his view it is good to stress the protection of human rights, yet the Court has failed to shed light on the content of the Directive, which was interpreted very broadly. He adds that the Court did not make reference to the Charter of Fundamental Rights, which is interesting both from the aspect of the development of Community law and the national law of Member States. That omission is all the more striking as the Charter includes specific provisions about the protection of personal data, and the Advocate-General made a reference to that. The European Court of Justice did not recognize the Charter's binding force in its earlier decisions either, and the decision concerned indicates that the Court has not changed its position on that point.[28]

8. There is another decision of the European Court of Justice related to data protection, where the Directive is applied in a broad manner: the case of Mrs. Bodil Lindquist.[29]

Mrs. Lindquist was a Swedish church volunteer worker, who operated a home-based website, onto which she loaded – among other things – the names and certain data of her fellow parishioners, without obtaining the data subjects' prior consent. She published on her website for instance that a fellow worker was only available for part-time work because she had had a leg injury. Legal proceedings were then initiated against Mrs. Lindquist, because what she did

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[26] Matthias Ruffert: Die künftige Rolle des EuGH im europäischen Grundrechtsschutzsystem, *Europäische Grundrechte Zeitschrift* 2004, pp. 467-468.

[27] Birte Siemen: Grundrechtsschutz durch Richtlinien, *Europarecht* 2004, pp. 313-316.

[28] Claus Dieter Classen: Joint Cases C-465/00 and C-139/01, *Common Market Law Review* 2004, pp. 1382-1385.

[29] *See* the decision handed down in the case C-101/01 on 6 November 2003.

was seen as processing personal information under Swedish data protection legislation, which in turn is based on the relevant EU Directive. A Swedish appeal court then referred to the Court of Justice for a preliminary ruling the interpretation of the relevant Community legislation.

The decision of the European Court of Justice held that the Directive had to be applied (item 27). The Court took note that data processing did not occur in connection with a business activity and there were no flows of data between Member States, however it insisted on the application of the Directive. The Reasoning of the decision says that if the case were interpreted in another way, the implementation of the Directive would depend on uncertain judicial discretion. In that case it would be impossible to attain the key objective of the Directive: the smooth operation of the internal market (items 39-42). The Court held furthermore that the notion "health-related data" had to be interpreted broadly. All pieces of information related to the health, physical and mental state of persons must be treated as health data (item 50). The Reasoning of the decision points out, however, that the Directive did not cover data published on the Internet. Referring to those circumstances, the Court stated that there was no forwarding of data to either Member States or third countries items (67-71).

The European Court of Justice discussed fundamental rights separately. It said the process of integration and the normal operation of the market inevitably involve the flows of personal data between the Member States, which makes it necessary to deal with data protection and the right to privacy. The decision adds that the Directive offers rules in general terms and the Member States have a margin of appreciation in implementing the Directive to find the best balance between conflicting interests, when they frame national legislation. The Swedish court concerned will have to decide – on the basis of the European Union's rules that are meant to protect the fundamental rights, and on the basis of general rules (including proportionality) – how to consider the restriction of Mrs. Lindquist's right to express her views and to exercise religious activities vis-à-vis the protection of privacy of other persons (items 84-90).

Let us note that the Swedish court probably referred that question to the European Court of Justice, because in the Swedish constitutional approach the point of reference is recognition of the freedom of expression and the freedom of information, which may only be restricted in unavoidable cases. In Sweden the protection of personal data comes under the sphere of administrative law. The Directive was transposed into Swedish law by an Act of Parliament of 1998, however, that law provided: it may only be implemented if it does not contradict the Constitution.[30]

[30] European Commission for Democracy Through Law, Opinion on the Draft Law of Luxembourg on the Protection of Persons in Respect of the Processing of Personal Data, comments by Hans-Heinrich Vogel, CDL-AD(2002)19, Opinion no. 207/2002, item 10.

In connection with the fundamental rights the Court made reference to the European Convention on Human Rights, but it was silent about the practice of the European Court of Human Rights, and did not mention the Charter of Fundamental Rights.

From the standpoint of privacy, it is a pivotal question of that decision what position did the Court take about data protection and the collision of several rights. As for the second question: the equilibrium between conflicting fundamental rights, the commentaries that have been published so far do not quite agree in their interpretation of the decision. According to one commentator, the national discretion, the acknowledgement of proportionality is only reckoned with when sanctions are to be applied.[31] Another commentator states that, according to the Court, the Directive does not provide for the restriction of fundamental rights and therefore, such a restriction may only follow from national legislation, which transposes the Directive and adds to it detailed provisions.[32] When we read the whole text of the decision, we find the second interpretation more soundly founded.

On the question of data protection, the argument of the Court is unequivocal. The operation of the internal market and the free flow of data are requirements that must be enforced. It is that framework, in which the Member States have the discretion to define the rules of the protection of privacy.

9. According to the practice of the European Court of Justice, no rule to be directly applied in civil law is generated by any directive of the European Union. The Court announced that principle in 1986 in the Marshall case,[33] and it confirmed it in the Faccini Dori case.[34] The protection of personal data in civil law did not come up in either the Austrian, or the Swedish cases. That having said, the Directive and the practice of the European Court of Justice need to be taken into consideration also in civil law cases. It is impossible to define the national rules of the protection of privacy according to legal relationships between domestic citizens and citizens of different countries, instead, they must be treated on grounds of unified principles.

As for the protection of fundamental rights, the various systems of rules have recently come to the forefront of interest. Several experts have analysed the shared and the differing components that can be found in the national legisla-

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[31] Ludovic Coudray: Case Law, Comment, *Common Market Law Review* 2004, p. 1375.

[32] Felix Hörlsberger: Veröffentlichung personenbezogener Daten im Internet, *Österreichische Juristen Zeitung* 2004, pp. 745-746.

[33] *Marshall* v. *Southampton and South-West Hampshire Area Health Authority*. Decision handed down in case C-152/84 on 26 February 1986; item 48.

[34] *Paola Faccini Dori* v. *Recreb Srl.* Decision handed down in case C-91/92 on 14 July 1994; items 19, 22 and 24.

tions, the European Convention on Human Rights, Community law and in the several levels of judicial practice. The Council of Europe also discussed the new situation after elaborating the Charter of Fundamental Rights. The Committee of Venice has worked out an opinion about the harmony and differences between the European Convention on Human Rights and the Charter of Fundamental Rights, and the possibility that the European Union would sign the Convention.[35] During the preparatory work of the draft Constitution of the European Union there were consultations on the relations between the European Union and the Council of Europe, and the relationship between the Strasbourg Court and the Luxembourg Court. In case the draft Constitution of the European Union is adopted by the Member States, the need for the unification of the practice of the two courts will receive more attention than ever before.[36]

10. Conflicting regulations and interests make it difficult to elaborate uniform criteria for the protection of fundamental rights. The criteria for judicial discretion and decisions are not identical in the practice of the various courts. Let me illustrate this point by referring to some decisions passed by the European Court of Justice and the European Court of Human Rights.

In the case that we refer to as the first example, the local loop was unbundled and there was a dilemma how best to ensure data protection, in other words, which data of the telephone subscribers could be publicly accessible. In its decision about the case the European Court of Justice strove to strike a balance between refraining from interference in the free operation of the market and protecting the personal data of subscribers. The decision held that data of all those subscribers had to be made publicly accessible, who had not prohibited their data from being published in the phone directory.[37] That decision probably complies with the principles laid down both in national legislation and the practice of courts.

The European Court of Human Rights considered a case on the basis of the 1981 European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The telephone conversation of a person was tapped, because that person was suspected to have committed a crime, but criminal proceedings had not been initiated yet. The European Court of Human Rights passed its decision by giving a broad interpretation to the

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[35] European Commission for Democracy Through Law, Opinion on Implications of a Legally-Binding EU Charter of Fundamental Rights on Human Rights Protection in Europe, Opinion no. 256/2003.

[36] The subject has extensive legal literature. Here we only mention a recent, comprehensive analysis: Rolf Schwartmann, Europäischer Grundrechtsschutz nach dem Verfassungsvertrag, Archiv des Völkerrechts 2005, pp. 129-152.

[37] Decision C-109/03, handed down in the case *KPN Tecom BV* v. *Onafhankelijke Post en Telecommunicatie Autoriteit* on 25 November 2004, items 23, 32, 34.

notion of privacy and established a violation of law.[38] Acting in the same vein, the Court handed down a similar decision in a case, where police recorded a conversation with a suspect that took place on the premises of police, without giving preliminary warning to the person concerned about the recording.[39] In the course of implementing Directive 95/46/EC the European Court of Justice could not follow a similar practice, because paragraph 2 of Article 2 of the Directive provides that the rules of the Directive may not cover activities in the areas of criminal law.

The Strasbourg European Court of Human Rights passed a decision in connection with a case, when a press publication carried an article about some persons' salary. The case was similar to the one, where the European Court of Justice examined the conduct of the Austrian Court of Audit in connection with the salaries of civil servants (*see* above). The European Court of Human Rights considered a case, where journalists were fined in administrative proceedings for publishing in a newspaper the salary of top managers of a company, whose workers were on strike. The Court held that the publication of data was justified.[40] On grounds of different facts in another case the European Court of Justice passed a decision with a different message. The essence of its decision was that the national court concerned must find such a way of keeping the public informed, where the names and salary of the persons concerned are not made public.

In the above passages we mentioned some cases, where the court decisions considered conflicting aspects of data protection on the one hand and, on the other hand, public interest in access to information, freedom of expression and freedom of the press. My purpose with those examples was to point out that general principles articulated in international forums that have a strong influence on national judicial practice are formulated on the basis of different international legal documents that have not been coordinated.

11. When we spoke of the Directive on data protection and the flow of personal data, we mentioned that the question of the collision and restriction of fundamental rights has repeatedly come up. In that context, although unrelated to data protection, I would call attention to a decision of the European Court of Human Rights of 2004 on conflicting aspects of the freedom of the press and the protection of privacy. In the Caroline von Hannover case, which attracted considerable attention, the Court gave preference to the protection of privacy.[41]

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[38] *Amman* v. *Switzerland*, appl. no. 27798/95, item 65 of a decision, passed on 16 February 2000.

[39] *P. G. and J. H.* v. *The United Kingdom*, appl. no. 44787/98, decision of 25 September 2001, items 56, 57, 59.

[40] *Fressoz and Roire* v. *France*, appl. no. 29183/95. The decision was made on 21 January 1999, *see* items 50 and 53.

[41] *von Hannover* v. *Germany*, appl. no. 59320/00, decision of 24 June 2004.

The cause of the legal dispute was that German magazines had published photographs that showed scenes from the private life of the Princess of Monaco. The princess did not consent to the taking and publishing of those photos. The Supreme Court of Germany partly rejected the claim of the princess, stating that the princess was a public personality and the photos had been taken in public areas. Then the princess referred the case to the German Constitutional Court. The Constitutional Court established the violation of privacy in connection with the photos that show the princess alongside her children. As far as the other photos were concerned, the German Constitutional Court stated in a detailed argument that keeping the public informed is more important, than a public personality's right to privacy. The legal dispute continued as to some unresolved issues and the claimant was dissatisfied with the more recent decision of the Constitutional Court. Then the princess referred the case to the European Court of Human Rights citing Article 8 of the European Convention on Human Rights.

In item 57 of its decision, the Strasbourg Court stated that Article 8 of the Convention both protects individuals from arbitrary interference by public authority, and imposes an obligation of action on the State. The obligation of action involves measures and regulations that ensure the protection of privacy even in dealings between individuals. There cannot be a clear definition of the dividing line between the State's said obligation to act and its obligation to refrain from interfering in the privacy of individuals. What really matters is that the right equilibrium must be found between the conflicting interests. Item 63 of the Court's decision says that there is a fundamental difference between the publication of facts about the activities of politicians, such publication promoting democratic debates, and publishing details about the private lives of individuals. The Court mentioned in passing that, as the princess did not hold public office, she could not be considered a public personality. Photographs that only satisfy the curiosity of certain sections of the readership, do not promote any debates of public interest (item 65). Under such circumstances the freedom of expression must be given a narrower interpretation (item 66). The Court cited a resolution of the Parliamentary Assembly of the Council of Europe that emphasized the need for the protection of privacy against one-sided interpretations of the law by certain media that attempt at justifying their violation of the rights enshrined in Article 8 of the Convention by referring to the freedom of expression (item 67). The Court underlined the importance of privacy under conditions, when technological progress has made it possible to process, store and reuse personal data (item 70).

Summing up the main points of its decision the Court stated that, even though the princess is widely known, that fact does not justify making public newspaper articles and photographs about her private life. The imperative to protect privacy overrules readers' curiosity and profit-seeking motivations of the media (item 77).

The decision of the Court referred to a position taken earlier under the aegis of the Council of Europe, which gives a somewhat narrower interpretation to the freedom of the press than earlier. The same tendency is reflected by a declaration that the Committee of Ministers of the Council of Europe adopted on 2 March 2005, which, after emphasizing the freedom of the press, calls attention to the importance of self-restraint on behalf of the media in the face of terrorism. The Committee of Ministers calls on the media to refrain from publishing declarations that support terrorism, and be aware of their key role in preventing the spread of hate speech. The document reminds the media of their duty to respect human dignity and the inviolability of privacy.

It goes without saying that the decision of the Strasbourg Court elicited heated responses in Germany. The decision came under severe criticism by the media; voices of opposition could be heard from the Constitutional Court; certain experts on public law claimed that the decision lacked constitutional arguments, while experts on civil law interpreted the decision as strengthening the protection of privacy.[42]

12. In the above-mentioned decision the Court only passed a judgement on the legal grounds of the claim, however, it suspended proceedings concerning the compensation for non-material damage and the repayment of costs. After the decision was issued, a settlement was made between the parties to the proceedings: the claimant received 10,000 euros in compensation for non-material damage and 105,000 euros in compensation for her costs.[43]

That decision once again placed in the limelight the question of compensation for non-material damage related to the violation of privacy. That issue has been the subject of an expert debate for long.

The new practice became clear in German law in the wake of the decision of the German Supreme Court and then of the Constitutional Court about an interview with Empress Soraya of Iran. As the empress gave no interview whatsoever, a court obliged the magazine publishing the faked interview to pay massive damages on the basis of the BGB's rule about damages [in German: *Schmerzensgeld*] of that type.[44] German legal experts disagreed on whether the ruling was based on the protection of privacy under the German Constitution or on a civil law institution that seeks to prevent the violation of privacy. The opinion Larenz voiced seems to have been borne out by judicial practice,

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[42] Martin Scheyli: Konstitutioneller Anspruch des EGMR und Umgang mit nationalen Argumenten, *Europäische Grundrechte Zeitschrift* 2004, pp. 628, 633, 634., Tilman Hoppe: Privatleben in der Öffentlichkeit, *Zeitschrift für Europäisches Privatrecht* 2005, p. 659.

[43] Press release issued by the Registrar, Chamber judgment (just satisfaction) – *von Hannover* v. *Germany* 420a(2005)

[44] *Neue Juristische Wochenschrift* 1965, 685, BVerfGE 34, 269.

namely that the damages were adjudicated on the basis of civil law considerations.[45]

The nature of Schmerzensgeld (also called recompense) has also been subject of debate. Ever since the 19th century, conflicting views have been put forward, whether such Schmerzensgeld belongs to criminal law. In fact, the debate between proponents and opponents of those calling it a punishment of a private character has still not been decided. The doubts about the nature of Schmerzensgeld were not dispelled, even when in 1990 the second sentence of the first paragraph of Article 847 of BGB was repealed. That sentence included the provision that – as a rule – the claim to Schmerzensgeld was not inheritable. Even after repealing the rule that strengthened the criminal law character of Schmerzensgeld, it cannot be doubted that Schmerzensgeld has some features that are different from the universal characteristics of compensation.[46] In addition to its criminal law features, some experts criticize the uncertainty and unpredictability of that retrospective sanction in connection with privacy, in cases where there is a collision of fundamental rights (especially in cases of the collision of the freedom of expression and human dignity, and rights derived from the latter).[47]

However, respected legal experts are strongly opposed to breaking away from the core idea of compensation and stepping towards the strengthening of the criminal law character. Instead of such a change in approach, they recommend to take away the financial gain of the offender citing unjust enrichment.[48] Presently the typical amount of compensation for non-material damage ranges between 3,500 euros and 10,000 euros. The courts only adjudge a higher compensation in exceptional cases. As compensation cannot ensure appropriate protection, there is consensus among German jurists that the right to privacy should be protected with more powerful legal instruments.[49]

The protection of privacy has been a serious challenge also in French law. That is why the *Code Civil* was amended in 1970. Under Article 9 of the *Code civil*, which was inserted in that year, privacy must be honoured and, when that obligation is violated, the court may have recourse, in addition to compensation, to

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[45] Karl Larenz: *Lehrbuch des Schuldrechts*, 13. Aufl. Von Claus-Wilhelm Canaris, München 1994. II/2. pp. 492-496.

[46] Bernd-Rüdiger Kern: Die Genugtuungsfunktion des Schmerzensgeldes – ein pönales Element im Schadensrecht? *Archiv für die civilistische Praxis* 1991, pp. 247-262.

[47] Johannes Hager: Der Schutz der Ehre im Zivilrecht, *Archiv für die civilistische Praxis* 1996, pp. 172-173.

[48] Franz Bydlinski: Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft, *Archiv für die civilistische Praxis* 2004, pp. 345-346.

[49] Alexander Bruns: Persönlichkeitsschutz und Pressefreiheit auf dem Marktplatz der Ideen, *Juristen Zeitung* 2005, pp. 430, 434.

other measures (as for instance, the confiscation of certain objects). The violation of privacy has been subject of several debates. In most cases lawsuits of well-known personalities, such as Marlene Dietrich, Jean-Louis Trintignant, Bernard Blier or Catherine Deneuve attracted attention, yet the problem cannot be limited to famous film actors and actresses. When the *Code Civil* was amended, the imposition of compensation was among the new measures introduced. However, on several occasions the interpretation of that compensation caused controversy. In a decision of 1996 the Supreme Court (*Cour de Cassation*) stated that it is in the judicial discretion to determine the size of the sum to be paid in damages on the basis of the breach of law (publishing photos in a magazine without the consent of the person concerned). The controversy continued, however: when damages are paid with reference to Article 9, to what extent is necessary to apply the general rules of compensation.[50] The information available shows that the sum of damages so adjudged is somewhat higher than in the German judicial practice, but the difference is not significant.[51]

English tort law is radically different from that of the countries of continental Europe. Suffice it to mention here that the Law Commission has reviewed aspects of compensation for non-material damage and did not recommend introducing new rules.[52]

13. A decision the European Court of Human Rights passed in summer 2005[53] is related to that topic. The publisher of an Irish newspaper was ordered to pay IEP 300,000 in damages; the Supreme Court confirmed the sentence. The newspaper had carried an article that claimed a certain Irish politician had committed a serious crime and was a supporter of anti-Semitism and repressive Communist regimes. The damages adjudged were three times as high as those normally adjudged by the Irish Supreme Court in cases of libel. The Strasbourg Court established that the damages adjudged qualified as interference in the claimant's freedom of expression as it is defined by Article 10 of the European Convention on Human Rights and Fundamental Freedoms (item 109). However, the Court accepted the premise that in a democratic society it is necessary to apply sanctions against libellous claims, just like an earlier decision stated this in a similar case.[54] The Court found orientation in the proportionality standard of the above-mentioned case of Caroline von Hannover once again (item 110). The Court took into account that the Irish Supreme Court could inspect

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[50] Henri Capitant, François Terré, Yves Lequette : *Les grands arrêts de la jurisprudence civile*, 11[e] éd. Paris 2000, I. pp. 91-97.

[51] Bruns (op. cit., footnote 49) p. 433.

[52] Winfield and Jolowicz *On Tort*, 15th ed. By W. V. H. Rogers, London 1998, p. 764.

[53] Decision handed down on 16 June 2005 in the case *Independent News and Media and Independent Newspapers Ireland Limited* v. *Ireland*, appl. no. 55120/00.

[54] *Tolstoy Miloslavky* v. *the United Kingdom*, decision of 13 July 1995, Series A, no. 323, item 49.

the size of the damages adjudged by the jury and that the imposition of high damages was not without precedents in the Irish judicial practice. Taking all those factors into consideration, the Court concluded that the imposition of those damages belonged to the discretion of the State indeed, and that the seriousness of libel and the magnitude of the sanction applied did not violate the principle of proportionality (items 129-132). Consequently, the Court did not establish the violation of Article 10 of the Convention.

14. In the course of regulating the civil-law protection of privacy, legislators must reckon with relevant provisions of Community law and the practice of both the European Court of Justice and the European Court of Human Rights. In 2002, during the preparatory work of the new Hungarian Civil Code the Main Committee on Codification published in the *Official Gazette* a theoretical concept of the Civil Code.[55] In 2005 the publication of preliminary draft texts of the Civil Code began, including the provisions that cover privacy.[56]

It would be beyond the scope of this paper to analyse the various tendencies in codification. I find it sufficient to mention that I sense efforts to take into consideration both the relevant provisions of Community law and the European Convention on Human Rights.[57] The declarative rule about the ban on discrimination was transposed into the draft text from the relevant Directive of the European Union. As for data protection, the draft text is content with enunciating the basic tenet, but leaves the detailed regulations to other rules of law. The way the draft text separates the constitutional and civil-law aspects of the protection of privacy seems to be more straightforward, than either the relevant provisions of the Hungarian Civil Code presently in force or the theoretical concept published in 2002.

A new legal institution, called „grievance award" (in Hungarian: *sérelemdíj)* appears both in the theoretical concept and the preliminary draft text of the Civil Code. The grievance award is payable, when privacy is violated. If adopted, the grievance award would replace the controversial public penalty, which is in the Civil Code currently in force. The grievance award could fulfil the function of compensation for non-material damage. (Ever since the adoption of the Civil Code in Hungary, the compensation for non-material damage has been subject of professional debates, yet a detailed elaboration of that subject would deserve another paper.) By comparison with the theoretical concept of 2002, the draft text of 2005 offers a more straightforward interpretation of

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[55] Magyar Közlöny (*Official Gazette of Hungary)*, no. 15 of 2002, vol. II.

[56] *Polgári jogi kodifikáció* (Codification of Civil Law), no. 3 of 2005.

[57] That statement relies, among other things, on the fact that the reasoning of the preliminary draft refers to a work written by András Sajó: *A szólásszabadság kézikönyve* [A Handbook of the Freedom of Speech], Budapest, 2005, which carries an analysis of the judicial practice of the Strasbourg Court.

the approach to the general rules of compensation. The task, in the first place, is to apply the rules of tort liability, yet when the size of the grievance award has to be adjudged, the court passes its decision upon considering all relevant circumstances of the case. The criteria of proportionality are apparently reckoned with in the draft text's provisions on how to determine the size of the damages to be paid.

15. When examining the influence of Community law and the practice of the European Court of Human Rights on the development of national legislation, we should reckon with both legislation and practice. That doubly applies to the Hungarian legal system, where judicial practice plays a greater role, than in numerous other countries of Europe. In the field of judicial procedure, the relationship between Community law and the Hungarian judicial practice seems to be simple. The relationship, however, with the practice of the Strasbourg Court does not seem to be that certain. As a rule, the decisions of the European Court of Human Rights establish obligations towards the states that have signed the European Convention on Human Rights. Recently, however, a decision was made about a case that is related to Germany, and that case attracted considerable attention in German legal literature, because it shed a new light on how to implement a decision of the Strasbourg Court.

After a court passed a binding decision on child access arrangements, the father turned to the European Court of Human Rights. The Court established that the German judicial decisions violate Article 8 of the European Convention on Human Rights. Having received the Court's decision, the father requested that the judgement of the German court concerned should be altered. In the course of the appeal proceedings the Court of Naumburg rejected the father's claim on the grounds that the decision of the Strasbourg Court may not abrogate a binding judgement that had been handed down by a German court. Then the father submitted a complaint to the German Constitutional Court. The Constitutional Court admitted his complaint. Giving a detailed analysis of the relationship between international law and national law on the basis of the German Constitution, the Constitutional Court stated that when national law is interpreted the European Convention on Human Rights must be taken into consideration, and it is the duty of all state organs to avoid any violations of the Convention. The decision of the Strasbourg Court has a binding force towards all the organs of the German State. By contrast, the Constitutional Court held furthermore, that no international organization might directly interfere in a national legal system. National courts must take into consideration the Convention and the decisions of the Strasbourg Court, but it depends on the rules of procedure concerned to what extent it is possible to pass a follow-up decision in view of facts that be-

come known retrospectively.[58] A statement the president of the German Constitutional Court issued for the *Frankfurter Allgemeine Zeitung* further complicated the matter. The statement has been interpreted as saying that, in the opinion of the German Constitutional Court, international law does not in every case place the German judicial authorities under the obligation of compliance, because in the view of the German Constitutional Court, the duty of the Strasbourg Court is to formulate general requirements related to the Convention, rather than seeking case-by-case corrections of judicial decisions.[59] The debate that has begun in the legal press covers aspects of the Convention, decisions of the Court and their relationship with international law.[60]

I consider mentioning that question timely, because since then the question of how to interpret „binding effect" has come up in connection with a more recent decision of the European Court of Human Rights.[61] Such matters constitute practical questions in the protection of privacy. In the wake of decisions handed down by the constitutional courts of certain countries, steps were taken to amend the codes of civil procedure. It would be worth examining, whether problems similar to the ones discussed in connection with German law might come up, when the implementation of decisions of the Strasbourg Court involve other measures than paying damages.

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[58] Decision of the BVerfG of 14 October 2004 in the Görgülü case. Published by *Europäische Grundrechte Zeitschrift* 2004. pp. 741-748.

[59] Hans-Joachim Cremer: Zur Bindungswirkung von EGMR-Urteilen, *Europäische Grundrechte Zeitschrift* 2004, p. 683.

[60] Heiko Sauer: Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur, *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* 2005, pp. 35-69, Jens Meyer-Ladewig, Herbert Petzold: Die Bindung deutscher Gerichte an Urteile des EGMR, *Neue Juristische Wochenschrift* 2005, pp. 15-20.

[61] *Rustam Sultanovich Mamatkulov, Zainidin Abdurasulovitch Askarov* v. *Turkey*, appl. no. 47827/99 and 46951/99, decision passed on 4 February 2005. Published by *Europäische Grundrechte Zeitschrift* 2005, pp. 357-365., Karin Oellers-Frahm: Verbindlichkeit einstweiliger Anordnungen des EGMR, *Europäische Grundrechte Zeitschrift* 2005, pp. 347-350.

SUMMARY

On Certain Aspects of Privacy

ATTILA HARMATHY

The importance of the right to privacy has considerably risen in recent decades. As the legal regulation of this issue widely varies from country to country, it is justified to make a comparative approach and study related developments in several countries.

The Civil Code Hungary adopted in 1959 devoted limited scope to the right to privacy. A noticeable shift occurred, when it was amended in 1977, and then following the political changes of 1990. Changes in constitutional law, increased attention to the protection of human rights, as well as the stupendous technological progress play a significant role. Issues of data protection have come to the limelight in recent years.

An analysis of the relevant Hungarian rules of law currently in force is inconceivable without studying the relevant instruments of the law of the European Union, the practice of the European Court of Justice, the conventions signed under the auspices of the Council of Europe and the decisions of the European Court of Human Rights. Taking a closer look at the practice of the European Court of Justice, it is worth examining the case of the Austrian Court of Audit as well as the case of Mrs. Lindquist; and the case of Caroline von Hannover as treated by the European Court of Human Rights in Strasbourg.

Compensation for non-material damage – which has been the subject of a decades long debate among Hungarian legal experts – is an important institution, when we discuss the efforts at strengthening the right to privacy. Now that preparations for a new Civil Code are underway in Hungary, it is useful to examine related tendencies in Community law, the instruments issued under the aegis of the Council of Europe, and the practice of the European Court of Justice and the European Court of Human Rights.

RESÜMEE

Einige Fragen der Persönlichkeitsrechte

ATTILA HARMATHY

Die Persönlichkeitsrechte haben in den vergangenen Jahrzehnten an Bedeutung erheblich zugenommen. Die rechtliche Regelung der Frage zeigt wesentliche Unterschiede in den verschiedenen Ländern. Diese Umstände rechtfertigen eine vergleichende Bearbeitung der Frage, im Rahmen deren die auf internationaler Ebene sichtbaren Entwicklungen unter die Lupe genommen werden.

In Ungarn widmete das 1959 verabschiedete *Bürgerliche* Gesetzbuch den Persönlichkeitsrechten nur einen kleinen Raum. Zu einer bedeutenden Änderung kam es bei der Novellierung des ungarischen BGB im Jahre 1977, bzw. in der Zeit nach den Umwälzungen im Gesellschaftssystem. Eine große Rolle spielen die Änderungen im Verfassungsrecht, der Schutz der Menschenrechte und auch die sprunghafte technische Entwicklung. In den letzten Jahren traten auch die Fragen des Datenschutzes in den Vordergrund.

Auch für die ungarische Rechtsentwicklung sind einerseits die Rechtsnormen der Europäischen Union und die Rechtsprechung des Europäischen Gerichtshofs, andererseits die Abkommen des Europarats und die Entscheidungen des Europäischen Gerichtshofs für Menschenrechte von großer Bedeutung. Aus der Rechtsprechung des EuGH sind die Fälle Österreichischer Rechnungshof bzw. Lindquist, und von der Rechtsprechung des Gerichtshofs in Strassburg die Rechtssache Caroline von Hannover in Betracht zu ziehen.

Bei den Bestrebungen zur Verstärkung des Schutzes der Persönlichkeitsrechte spielt der Schadensersatz für Nichtvermögensschäden eine große Rolle, worüber auch im ungarischen Recht schon seit Jahrzehnten diskutiert wird. Auch im Zusammenhang mit der Vorbereitung des neuen Bürgerlichen Gesetzbuches ist es sehr wichtig, die Tendenzen sowohl in der Europäischen Union als auch im Europarat, und auch die Rechtsprechung der genannten zwei Gerichte zu verfolgen.

THE EUROPEANISATION OF LABOUR LAW AND ITS IMPACT ON THE NEW MEMBER STATES

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1. Introduction

On 1st May 2004 eight countries of Central and Eastern Europe (CEE) together with Malta and Cyprus joined the European Union (EU): Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. The enlargement of 2004 is without any doubt the biggest challenge the EU has ever faced, not only in terms of quantity but also in terms of quality. The surface area of the EU increased by one third and the population grew from about 390 000 to about 450 000. At the same time the GDP only increased by 5 per cent, which means that within the EU the GDP per head declined by about 18 per cent[1]. The number of languages spoken in the EU almost doubled and the problem of finding a fair balance between smaller and bigger countries has become more urgent than ever.

In the context of this enlargement situation the CEE States are of specific interest. They still have to complete the process of switching from a State-controlled economy to a market-based economy and thereby have to develop systems of industrial relations that not only function efficiently but are adapted to the particular socio-cultural environment of the country concerned. There are significant differences between the various CEE States, and it would be a mistake to lump all of them together in this respect.[2] It should be kept in mind that already in the communist period the situation of these countries was quite different. There were no signs of reform whatsoever in the Baltic States, which were integrated in the Empire of the Soviet Union, whereas countries like Poland or Hungary had already undertaken economic reforms before the downfall of the iron curtain. And of course all of the CEE countries do have

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[1] See M. Ladó, EU Enlargement: Reshaping European and National Industrial Relations, The International Journal of Comparative Labour Law and Industrial Relations (IJCLLIR), vol. 18, 2002, 101

[2] For these very significant differences see the enlightening report by M. Ladó on „Industrial relations in the candidate countries", European industrial relations observatory on-line, http://www.eiro.eurofound.eu.int/2002/07/feature/TN0207102F.htm

very different traditions dating back long before the communist period. However, in spite of all these differences it is possible to identify characteristics that these countries all have in common.

The focus of my reflection, therefore, will be on the question how the common features of labour law and industrial relations in the CEE countries (neglecting Malta and Cyprus) will affect the Europeanization of labour law and industrial relations and what impact the latter will have on the transformation process in the CEE States.

After sketching very briefly the basic features of the development of industrial relations in the CEE States (2) an attempt will be made to describe the features of the Europeanization of industrial relations (3). Then the question is to be discussed whether and how the two can be linked together in this integration process[3] (4).

2. Labour Law and Industrial Relations in the CEE States

The CEE States were confronted with the dilemma of transforming simultaneously an authoritarian regime into a democracy, a planned economy into a market economy and a party-dictated system of labour law and industrial relations into one, which is compatible with political freedoms and market economy. The present structure of labour law industrial relations in the CEE States to a great extent is still to be explained as a reaction to and a legacy of the communist system of the past. It is – as will be shown – the expression of a highly individualistic neo-liberal approach.[4] In the communist period employment relationships were embedded in large production units or large administrations, distinctions between private law employees and state employees were almost non-existent and the employees enjoyed – at least on paper – far-reaching protective standards. Even if the party-dominated trade unions played an important role in this overall bureaucratic and highly regulated system, collective labour law in a Western sense was practically unknown. In spite of the fact that the terminology of collective bargaining was used, the respective mechanism had nothing to do with the counterparts in the West. And on individual level it has to be kept in mind that the individual employment contract had almost nothing to do with contractual freedom: the

[3] For a brief discussion of this challenge see also M. Weiss, The social dimension, in R. Langewiesche / A. Toth, The Unity of Europe, European Trade Union Institute, Brussels, 2001, 123, and M. Weiss, Industrial Relations and EU-Enlargement, in R. Blanpain / M. Weiss (eds.), Changing Industrial Relations and Modernisation of Labour Law, Kluwer Law International, The Hague / London / New York, 2003, 439

[4] M. Stanojevic / G. Grades, Workers' representation at company level in CEE countries, TRANSFER, vol. 9, 2003, 31 (44)

terminology was also here misleading. The mentioning of these few characteristic signs of labour law and industrial relations in the communist period show the dramatic challenge the CEE countries were confronted with after the downfall of the former system.

2.1. Trade Unions

In the period before the political change in the CEE States the rule was a monistic system of trade unions, which – as already indicated – were more or less mere instruments of the ruling party. There was an important exception: the movement of Solidarnosz in Poland was created as an autonomous alternative to the existing trade union structure. The monistic pattern of the communist period in the meantime has been replaced by an excessive pluralism. Quite often it looks as if trade unions are more concerned to compete with each other, than understanding their role as being the counterpart to the employers' side, thereby weakening the strength of the labour movement as a whole[5]. But the situation is even worse. The creation of a private sector in the economy has gone hand in hand with an extensive erosion of the system of trade union representation. The backbone of the new private sector in these countries are the small and medium-sized companies (SMEs), trade unions practically do not exist there and do not play any role[6]. Since in these SMEs there are no other bodies representing employees' interests, the result in most cases is total individualization of the relationship between employers and employees. Trade unions – as already in the old system – only play a role in the bigger – still or formerly State owned – enterprises. On the whole, the organisation rate of trade unions has declined significantly[7].

2.2. Employers' Associations

The situation of employers' associations is even worse. They only exist to a very rudimentary extent and mainly represent the interests of the big enterprises, many of them are still not yet privatized. In principle, the employers in the SMEs do not see yet the need to organize. If employers' associations are founded, this is done not in a perspective of acting as a counterpart to trade unions, but with the intention of lobbying for common business interests[8]. Therefore, on the whole, employers' associations may be considered to be a rather marginal player up to now[9].

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[5] H. Kohl / H.-W. Platzer, Labour Relations in Central and Eastern Europe and the European social model, TRANSFER, vol. 9, 2003, 11 (15)

[6] For details see M. Ladó / D. Vaughan-Whitehead, Social Dialogue in candidate countries: what for ?, TRANSFER, vol. 9., 2003, 64 (69)

[7] M. Ladó / D. Vaughan-Whitehead (FN 6) 66

[8] See M. Ladó (FN 2) under the subtitle „Diversity in industrial relations – heritage of the past"

[9] See M. Ladó / D. Vaughan-Whitehead (FN 6) 70

2.3. Tripartite Arrangements

A characteristic feature of most of the CEE States are tripartite arrangements on national level. These are bodies to discuss issues of restructuring the economy and of ways of promoting social justice. There is no doubt: this tripartite social dialogue has its merits and has played an important role in the process of restructuring industrial relations in the CEE States. However, the problem consists in the fact that this social dialogue is asymmetrical. The State still dominates weak trade unions and even weaker employers' associations. These discussion forums are largely serving to legitimize the respective Government's policy[10]. In spite of the structural deficiency many decisions are taken in the tripartite social dialogue, thereby preventing to a certain extent the evolution of autonomous bilateral collective bargaining structures. However, there is at present no alternative to the tripartite social dialogue as it exists: it is absolutely necessary to create acceptance for all the transformation work that has to be carried out. It has to be stressed that these arrangements on national level do not have a supporting structure on lower levels.

2.4. Collective Bargaining

In view of the weakness of the employers' associations and of the non-existence of collective actors, in big parts of the economy it is no surprise that collective bargaining is rather the exception than the rule, and that – at least in principle – it only takes place on company or plant level. Multi-employer bargaining mainly happens in the companies, which formerly were parts of a State owned big enterprise and now are fragmented in different parts[11]. However, there is practically no bargaining on higher levels: be it the sectoral or the national one[12]. The coverage by collective agreements is very low. They only play a role in bigger companies, the big amount of companies in the private sector is not at all affected by them.

2.5. Employees' Involvement in Management's Decision-Making

Due to the experience made before the downfall of the iron curtain there is still much reluctance to accept workers' participation as a feasible pattern in the new market economy[13]. Nevertheless, there is quite a lot of legislation providing for

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[10] M. Ladó (FN 1) 111

[11] See M. Ladó (FN 2) under the subtitle „Sectoral collective bargaining – current state of affairs"

[12] M. Ladó / D. Vaughan-Whitehead (FN 6) 73

[13] See M. Sewerynski, Employee Involvement and EU Enlargement – Polish Perspective, in M. Biagi (ed.), Quality of Work and Employee Involvement in Europe, Kluwer Law International, The Hague / London / New York, 2002, 263 (270)

institutionalized workers' participation[14], in most cases without the support of the social partners. There is scepticism and opposition in particular in the trade union camps. There are mainly three problems. First, this pattern only plays a role in big companies[15]. Secondly, the institutional arrangements in some cases are too much of a copy of systems of Western Europe, and therefore do not really fit into the overall structure of the respective country. Finally, there is no appropriate division of labour between trade unions and such bodies of workers' participation. This lack of a consistent and coherent concept of the system of industrial relations as a whole creates rivalry and suspicion, and in the very end weakens and de-legitimises the position of elected workers' representatives as well as of the trade unions. It, however, again has to be stressed that in the big majority of companies in the private sector neither trade unions nor other bodies of workers' representatives exist. Where they are formally present, they in actual practice quite often are under management control, mere „extensions of managerial structures"[16].

2.6. Law in the Books and Law in Action

The production of legislation after the political change in all CEE States has been quite impressive and is still continuing to an enormous extent[17]. This ties in with the legalistic approach that is still commonly found in the CEE States, whereby a problem is regarded as having been solved if a law or regulation has been passed to deal with it. The gap between the normative level and day-to-day practice remains considerable[18]. There are many reasons for the fact that the implementation side is so unsatisfactory, ranging from resentment of intervention on the basis of labour legislation to a lack of controls and inefficiency of the existing judicial system or other conflict resolving bodies. In view of their weakness neither trade unions nor other bodies of workers' representation are in a position to really monitor the factual implementation of statutory law.

In addition it has to be stressed that within the large number of companies in the private sector of the CEE countries in actual practice labour law plays no role whatsoever. It is made too easy for companies to sign contracts on the basis of general civil law and thus to avoid the statutory labour and social

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[14] For an overview see H. Kohl / H.-W. Platzer (FN 5) 15 and M. Ladó (FN 2) under the subtitle „Information and Consultation of workers"

[15] M. Stanojevic / G. Gradev (FN 4) 45

[16] ibidem

[17] See the discussion paper by A. Bronstein, Labour Law Reform in EU Candidate Countries: achievements and challenges, on-line http.//www. ilo.org/public/English/dialogue/ifpdial/download/papers/candidate.pdf

[18] See M. Ladó / D. Vaughan-Whitehead (FN 6) 80

provisions aimed at providing employees with a degree of protection[19]. This leads, of course, to a constant process of de-legitimization of labour and social security legislation. And as a result to an increasing extent a mentality can be observed, which praises the free game of market forces in the absence of labour law and social security law as well as the absence of collective structures as an ideal precondition for prosperity.

3. The Europeanization of Industrial Relations

3.1. Fundamental Social Rights

After a long-lasting and very controversial debate in 2000 the Charter of Fundamental Rights of the EU was passed as a legally-non binding declaration, expressing the consensus of all present Member States. In the meantime the draft for a Constitutional Treaty, replacing and amending the old Treaties on the EU and on the EC, has integrated this Charter in its text to make it legally binding. In spite of the still existing controversies on the issue of qualified majority there is no doubt that the Constitutional Treaty will be accepted in the near future.

Within the Charter there is a specific chapter for fundamental social rights under the title „solidarity". But even outside this chapter there is a whole set of such rights of utmost importance in the social context, including the freedom of association, which implies the right of everyone to form and to join trade unions for the protection of his or her interests (Art. 12). The chapter on „solidarity" as such contains twelve core rights, including the workers' right „to working conditions which respect his or her health and dignity" (Art. 31 par. 1), the right of collective bargaining and collective action, which is guaranteed as a subjective right either for workers and employers or for their respective organizations (Art. 28), and the right for either workers or their representatives to information and consultation in good time in reference to management's decision making (Art. 27). The two latter fundamental rights, of course, are of utmost importance in the context discussed in this paper.

In evaluating the content of the chapter on „solidarity" it has to be stressed that it includes collective rights, it insists on the Community's and the Member States responsibility for providing job security, for providing working conditions which respect the worker's health, safety and dignity and for protecting young people at work. It furthermore insists on measures to make family and professional life compatible and to provide social security as well as

[19] Cs. Kollonay-Lehoczky, European Enlargement – A Comparative View of Hungarian Labour Law (forthcoming)

social assistance. All this taken together it becomes pretty evident that this is a concept which would be incompatible with mere de-regulation, de-collectivization and de-institutionalization. Or to put it in broader terms: it would be incompatible with a strict neo-liberal approach[20].

3.2. Minimum Standards

Up to now the Community's legislative activity has not been characterized by a systematic approach. This is mainly due to the fact that social policy only gradually became a relevant factor in the context of the Community. Now there is a far-reaching power to legislate in the field of labour law and social security. However, the EC still has no power to legislate in reference to "pay, the right of association, the right to strike or the right to impose lock-outs". And there is no hope that this will be changed by the Constitutional Treaty.

In the meantime many topics are covered by Directives, thereby influencing the law of the Member States. However, my focus is not on these topics. It rather has to be stressed that to an increasing extent the Directives are shaped in a way, which gives the social partners and workers' representatives a significant role in implementing them. A very good example in this respect is the Directive on Working Time[21].

3.3. Social Dialogue

The umbrella organisations of the trade unions and of the employers' associations on EU level are not involved in collective bargaining, but are primarily considered to be a lobby for the respective interest groups they represent. They were for a long time informally cooperating with the Commission. This so-called „social dialogue" was for the first time formalized by the Treaty in 1986. In the meantime it has achieved a very elaborated structure by Art. 138 and 139 of the EC Treaty.

Nowadays the above mentioned actors are integrated into the legislative machinery. Before submitting a proposal of legislation the Commission has to consult them „on the possible direction of Community action". If the Commission then still wants to continue to elaborate a proposal, there has to be a second consultation of the parties of the social dialogue „on the content of this proposal". On this occasion the social partners can take over the Commission's initiative and try to regulate the matter by reaching an

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[20] For a detailed analysis of the impact of the fundamental social rights in the Charter see M. Weiss, The politics of the EU Charter of Fundamental Rights, in B. Hepple (ed.), Social and Labour Rights in a Global Context, Cambridge University Press, 2002, 73

[21] See in this context C. Barnard, The EU Agenda for Regulating Labour Markets – Working Time Revisited (forthcoming)

agreement. They have nine months to elaborate an agreement, which then – without the involvement of the European Parliament – can be transformed into a legally binding Directive by the Council. The Directives on parental leave, on fixed-term contracts and on part-time work are results of such a procedure. If the social partners cannot reach an agreement within the period of nine months, the task to draft a proposal falls back to the Commission.

The social partners however, according to the Treaty do have an alternative possibility. They are free to conclude agreements – even in matters where the EC has no legislative power – to be implemented „in accordance with the procedures and practices specific to management and labour and the Member States". Such agreements are not legally binding. It is up to the social partners on EU level to convince the respective actors in the Member States to transform the ideas contained in such agreements into their respective structure within the Member States. A recent example for such a strategy is the agreement on tele-work of 2002, whose possible impact now is vividly discussed in the different Member States.

In addition to the inter-professional social dialogue there is an increasing number of sectoral social dialogues[22]. They are not integrated into the legislative machinery. However, their institutional structure has recently been improved in a significant way. Their task is the representation of the specific interests of their sector within the EU and the conclusion of agreements, which now may be binding among them, but which remain to be voluntary for the actors on lower levels. Such agreements so far only play a marginal role[23].

3.4. Collective Bargaining

Up to now and certainly for a long time in the future collective bargaining remains to be a matter of policy within the Member States. The legal pattern of collective bargaining and collective agreements is different from country to country. There is, however, at least one feature common to the collective bargaining structure of all current Member States (with the exception of the UK): they all have an interrelated multi-level system[24]. But again, the rules on the relationship between agreements on different levels, or between old and new agreements, are different from country to country.

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[22] For a detailed analysis see B. Keller, Social Dialogue at Sectoral Level: The Neglected Ingredient of European Industrial Relations, in B. Keller / H.-W. Platzer (eds.), Industrial Relations and European Integration, Ashgate , Aldershot / Burlington, 2003, 30

[23] Ibidem 37

[24] See F. Traxler, European Monetary Union and Collective Bargaining, in B. Keller / H.-W. Platzer (eds.), Industrial Relations and European Integration, Ashgate, Aldershot / Burlington, 2003, 85 (90)

In view of this diversity it would be totally unrealistic to think in terms of a European Collective Agreement as an instrument to promote uniformity. Nevertheless, the need for more cooperation and coordination in collective bargaining throughout the Community has definitely increased due to the introduction of the European Monetary Union. The new currency leads to an increase of transparency: prices, wages and other working conditions can easily be compared. The discrepancies of working conditions between different Member States are becoming more evident. This to a bigger and bigger extent might lead to pressures to develop strategies directed to the goal of gradual convergence – at least in a long-term perspective.

The monetary union has a second impact on collective bargaining, which perhaps is even more important. So far it somehow was possible to cope with labour market problems by national monetary policy. There was a sort of interaction between the actors of collective bargaining and the National Reserve Banks. Now monetary policy is centralized and conducted by the European Central Bank. The question therefore has to be put, whether a collective bargaining structure can be established which would correspond to the European monetary policy as it did before to the national monetary policy[25].

The task consists in improving horizontal transnational coordination. In this respect at least some progress has been achieved in the last fifteen years. The first important step was the so-called Doorn-declaration of 1988, named after the Dutch town Doorn, where the declaration was signed. In this declaration the trade unions of Belgium, Netherlands, Luxembourg and Germany agreed on three core principles to be observed in collective bargaining throughout the European Community: (a) Wage settlements in collective agreements should correspond to the sum total of the evaluation of prices and the increase in labour productivity. (b) Collective agreements should make an attempt to strengthen mass purchasing power and focus on employment creating measures (shorter working time etc.) and (c) There should be regular information and consultation between the participating trade unions on developments in bargaining policy. In short: the idea was to influence the content of collective bargaining by the first two principles and to strengthen the horizontal communication by the third principle. The principles on content in the meantime have been redefined and shifted from wage issues to non-wage issues as for example life long learning. And the attempt of more intensive communication has been extended to continuous evaluation.

[25] For the interrelationship of monetary policy and collective bargaining see F. Traxler (FN 24)

In the meantime quite a few initiatives were started on sectoral level. In 1997 the German metalworkers' trade union launched a cross-border collective bargaining network. The idea was that each individual district of this trade union was supposed to develop a solid network of collective bargaining cooperation with the metalworkers' trade unions of neighbouring countries. In addition a common day to day information system on collective bargaining has been established. And finally, common working groups on specific bargaining issues have come into existence. The example of the German metalworkers' trade union in the meantime has been followed in Scandinavia by the Nordic metalworkers' trade unions and by trade unions from other sectors as for example the construction and the chemical industries.

The most promising and most far-reaching initiative was taken by the European Metalworkers Federation (EMF) in the late nineties of last century. It covers the EMF member countries as a whole. The EMF developed guidelines for national collective bargaining in order to prevent downward competition. In addition it developed Charters on specific issues: on wage bargaining, on working time bargaining and on bargaining for training conditions. Other issues are to be added. To just illustrate the approach for the case of wage bargaining it reads „the point of reference to wage policy in all countries must be to offset the rate of inflation and to ensure that workers' incomes retain a balanced participation in productivity gains". This of course is nothing more than a recommendation: the responsibility remains to be with the individual negotiating trade union. The EMF initiative has been accompanied by a remarkable process of institution-building. There is now an EMF Collective Bargaining Committee for assessing and further developing the structure of this initiative. And there are Working Parties for the specific issues. All this has led to continuous evaluation, to an intensified continuous communication and to a strengthening of personal links between representatives of EMF affiliates. Since 1999 the EMF has established a European Collective Bargaining Information Network (EUCOB), an excellent data base on recent developments in collective bargaining in the metal industries. In the meantime the EMF has been followed-up by other European trade union federations as are chemistry, construction, food, public service and textile.

In view of all these initiatives the ETUC passed a resolution in 1999 on a „European system of industrial relations", urging in particular for a „European solidaristic pay policy", which should be able to (a) guarantee workers a fair share of income, (b) counter the danger of social dumping, (c) counter the growing income inequality, (d) contribute to a reduction of disparities in living conditions and (e) contribute to an effective implementation of the principle of equal treatment of the sexes. In addition the resolution is stressing the European Federations' responsibility to coordinate collective bargaining.

In 2000 the ETUC passed a „European guideline for wage increases", which is very much shaped according to the model of the already mentioned EMF guideline on wage bargaining. The European Trade Union Institute (ETUI), the research institute of the ETUC, now annually evaluates the wage bargaining policy in the light of the guideline.

The listing up of all these initiatives is merely meant to illustrate that the need for transnational cooperation and coordination has been understood by the trade unions. Even if the structures are still in a rudimentary stage, they are an important element to develop a transnational perspective and thereby shape collective bargaining in the national context. Of course there is an evident deficiency: this development takes place exclusively on the trade union side[26]. There are no similar attempts on the employers' side. However, the more the strategy of coordination and cooperation will be a successful tool in the hands of the trade unions, the less it will be possible for the employers' associations to simply ignore this new reality.

The process of transnational coordination and cooperation could be significantly stimulated by the social dialogue, the inter-professional one as well as the sectoral one. The inter-professional social dialogue should not put all its energy in the preparatory steps of legislation, but should focus more on agreements to be implemented according to national law and practice. Thereby it could help to find out what topics might be of primary interest for regulation in a more coordinated way. Model agreements could present frameworks to enrich the imagination of the national actors[27]. In case the actors on European level cannot reach an agreement, each side at least could communicate to its constituency its respective view. Of course all such framework-agreements and communications would not be legally binding. But they could help to stimulate discussions on the domestic bargaining scene of how to cope with such proposals. It goes without saying that such a communication strategy can only function if there is a vertical dialogue between the European umbrella organizations and the different national constituencies.

It may be stressed that the recent developments in promoting the transnational coordination of collective bargaining in the EU context are definitely very promising. However, all available instruments are to be used to intensify and to

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[26] For a comprehensive overview on all these coordination activities see T. Schulten, Europeanisation of Collective Bargaining: Trade Union Initiatives for the Transnational Coordination of Collective Bargaining, in B. Keller / H.-W. Platzer (eds.), Industrial Relations and European Integration, Ashgate, Aldershot / Burlington, 2003, 58

[27] See for such a strategy M. Weiss, Social Dialogue and Collective Bargaining in the Framework of Social Europe, in G. Spyropoulos / G. Fragnière (eds.), Work and Social Policies in the New Europe, European Interuniversity Press. Brussels, 1991, 59

accelerate this process. The task is to build up a multi-level system with specific articulation on each level, with possibilities for feedback from one level to the other, with possibilities for mutual learning in the process of coordination. Such a system is supposed to leave the actors on lower levels utmost bargaining autonomy, but at the same time it puts pressure on them to cope with the frameworks established on higher levels. This „open method of coordination" in the meantime has become the catchword for the flexible strategy in balancing the needs for centralization and decentralization in a multi-level system of collective bargaining[28].

3.5. Employment Policy

The „open method of coordination" not only refers to coordinated collective bargaining, but to practically all policy areas in which the social partners are supposed to be integrated. A good example is the employment policy for which in the Amsterdam amendment to the EC Treaty „a co-ordinated strategy for employment" (Art. 125) was institutionalized. The genuine competence of the Member States in this very area remains uncontested. The Community is required to contribute to a high level of employment „by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action".

To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements: there is the Employment Committee, which is mainly supposed to monitor the situation on the labour market and the employment policies in the Member States and the Community and thereby help to prepare the relevant joint annual report by the Council and the Commission. In fulfilling its mandate, the Committee is required to consult the social partners. In order to make sure that the activities of the Employment Committee as well as the joint annual report by the Council and the Commission do not remain without consequences, the Chapter on Employment establishes additional powers for the Community. After examination of the joint annual report by the European Council and on the basis of the European Council's conclusions, the Council „shall each year draw up guidelines" (Art. 128 par. 2). The decision requires only a qualified majority.

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[28] For a comprehensive analysis of this strategy see European Commission, Report of the High level group on industrial relations and change in the European Union, Office for Official Publications of the European Communities, Luxembourg 2002; see also C. de la Porte / P. Pochet, Supple Co-ordination at EU Level and the Key Actors' Involvement, in C. de la Porte / P. Pochet (eds.), Building Social Europe through the Open Method of Coordination, Inter University Press, Brussels, 2002, 27

This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. The summits of Luxemburg, Cologne and Lisbon are important steps on this road[29]. However, the results in detail are of less importance in the context to be discussed here. Important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only governments but also the social partners. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time but can easily be communicated and imitated. The awareness by the media is growing significantly. The whole structure to an increasing extent is understood as a joint European activity. The goal – in spite of the wording of the Treaty – is a gradual denationalization and Europeanization of employment policy.

3.6. Employees' Involvement in Management's Decision Making

The perhaps most important input of the European Community into the field of industrial relations took place in the area of employees' involvement in management's decision-making[30]. Just like in the area of collective bargaining the situation in the different Member States was characterized from the very beginning by extreme diversity. Some countries were not at all abiding to such a philosophy of cooperation at all, but focusing exclusively on conflict and collective bargaining. In order to guarantee at least a minimum of employees' influence in management's decision making, in the seventies of last century the European legislator already prescribed patterns of information and consultation in case of collective redundancies[31] and in case of transfer of undertakings[32], and later on in the eighties on health and safety[33]. However, this was only a beginning. The program has become much more ambitious. In the meantime attempts were successful to establish patterns of employees' involvement on transnational scale and to uplift significantly the minimum level in the national context.

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[29] For a very reliable assessment of this development see J. Goetschy, European Employment Policy since the 1990s, in B. Keller / H.-W. Platzer (eds.), Industrial Relations and European Integration, Ashgate, Aldershot / Burlington, 2003, 137

[30] For a description of the debates leading to this development see M. Weiss, Workers' Participation in the European Union, in: P. Davies et alii (eds.), European Community Labour Law – Principles and Perspectives, Clarendon Press Oxford, 1996, 213

[31] (1975) Official Journal (OJ) L 48

[32] (1977) OJ L 61

[33] (1989) OJ L 183/1

The first step in this direction was the Directive on European Works Councils (EWCs) in 1994[34]. Instead of regulating everything in a substantial way it only provides for a procedural arrangement, establishing a special negotiating body representing the workers' interests and leaving more or less everything to negotiations between this body and the central management of a transnational undertaking or group of undertakings. It is up to the special negotiating body to decide with a two third majority not to request an agreement. Only if the central management refuses to commence negotiations within six months of receiving such a request, or if after three years the two parties are unable to reach an agreement, the subsidiary requirements set out in the Annex to the Directive apply. These subsidiary requirements are the only form of pressure available to the special negotiating body. Until the date of implementation into the national law of the Member States the Directive allowed for voluntary agreements where even the minimal conditions of the Directive did not play a role. In the meantime a bit more than a third of the undertakings covered by the Directive have implemented it in actual practice[35]. Where subsidiaries of CEE States are involved, representatives of those candidate countries voluntarily have become included into the EWCs. This has turned out to be an excellent strategy to reduce reservations against employees' involvement in management's decision-making as they still exist in the CEE States[36]. As empirical studies show the EWCs develop unpredictable dynamics of their own, achieving sometimes far-reaching agreements with the Central management: all depends on the interface with other factors of the overall industrial relations structure[37].

The same pattern as in the EWC Directive is followed by the second step, the Directive of October 2001 on employees' involvement in the European Company[38]. The Directive has to be read together with the Statute on the European Company, which contains the rules on company law.

A European Company can only be registered if the requirements of the Directive are met. Thereby it is guaranteed that the provisions on workers' involvement cannot be ignored. The structure of the Directive is very much the

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[34] (1994) OJ L 254/64

[35] For recent assessments of the factual implementation of the Directive see S. Demetriades, European Works Councils Directive: A Success Story?, in M. Biagi (ed.), Quality of Work and Employee Involvement in Europe, Kluwer Law International, The Hague / London / New York, 2002, 49 and T. Müller / H.-W. Platzer, European Works Councils: A New Mode of EU Regulation and the Emergence of a European Multi-level Structure of Workplace Industrial Relations, in B. Keller / H.-W. Platzer (eds.), Industrial Relations and European Integration, Ashgate, Aldershot / Burlington, 2003, 58

[36] For this effect see M. Sewerynski (FN 13) 272

[37] See T. Müller / H.-W. Platzer (FN 35) 80

[38] (2001) OJ L 294/22

same as in the Directive on European Works Councils: it provides for a special negotiating body, lists up the topics for negotiation and leaves everything to negotiations. In case the negotiations fail, there is a fall back clause, the so-called standard rules. The Directive contains two different topics, which have to be distinguished carefully. The first refers to information and consultation. Here the structure is very similar to the one developed in the Directive on European Works Councils. The application of the Directive on European Works Councils is excluded in the European Company.

The crucial and interesting topic of the Directive refers to employees' participation which is defined as „the influence of the body representative of the employees and/or employees' representatives in the affairs of a company by way of (1) the right to elect or appoint some of the members of the company's supervisory or administrative organ, or (2) the right to recommend and/or oppose the appointment of some or all members of the company's supervisory or administrative organ". Normally it is up to the negotiations how such a scheme has to look like. Only in case of transformation the agreement „has to provide at least the same level of all elements of employees' involvement as the ones existing within the company to be converted into a European Company". If in other cases a reduction of the participation level would be the result of the negotiations, qualified majority requirements apply which make sure that by way of agreement the existing highest level cannot be easily or carelessly reduced. If no agreement is reached, the standard rules apply and make sure that in cases where to a significant extent a scheme of workers' participation already existed prior to the engagement into a European company, the level of this scheme is maintained. However, no participation scheme is needed if none of the participating companies has been "governed by participation rules prior to the registration of the European Company."[39]

Also the third and perhaps most important step, the Directive of March 2002 on the minimum framework for information and consultation on national level[40], is shaped according to the same philosophy. It sets some minimum conditions and leaves everything else to the Member States. The Directive applies to establishments of at least 20 employees and to undertakings of at least 50 employees. In the original version of the proposal reference was only made to undertakings.

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[39] For a first evaluation of the Directive see M. Weiss, Workers' Involvement in the European Company, in M. Biagi (ed.), Quality of Work and Employee Involvement in Europe, Kluwer Law International, 2002, 63

[40] (2002) OJ L 80/29

The purpose of the Directive is „to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community". The Directive defines the structure of information and consultation in a much more comprehensive way than this was done so far in other Directives. The definitions contain important procedural requirements. Timing, content and manner of information have to be such that it corresponds to the purpose and allows the employees' representatives to examine the information and to prepare for consultation. Consultation has to meet several requirements: (1) it has to be ensured that the timing, the method and the content are effective; (2) information and consultation have to take place at the appropriate level of management and representation, depending on the subject under discussion; (3) the employees' representatives are entitled to formulate an opinion on the basis of the relevant information to be supplied by the employer; (4) the employees' representatives are entitled to meet the employer and to obtain a response, and the reasons for that response, to any opinion they may formulate; and finally (5) in case of decisions within the scope of the employer's management powers an attempt has to be made to seek prior agreement on the decisions covered by information and consultation. Unfortunately the Directive does not tell what happens if an agreement is reached, but the employer does not implement it.

Information has to cover the recent and probable development of the undertaking's or the establishment's activities and economic situation in its broadest sense. Information and consultation has to take place on the structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat of unemployment. Finally, information and consultation has to take place on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions.

On the whole, the Directive remains very flexible and leaves the structural framework and the modalities to a great extent to the Member States. Nevertheless, it turned out that the opposition of some countries could only be overcome by granting transitional provisions. They are supposed to apply if at the date of the entry into force of the Directive in the respective Member State (March 2005) there is „no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose". In these countries the first two years after implementation into national law the Directive only applies to companies employing at least 150, or establishments employing at least 100 employees. In the third year this is lowered to 100 and 50. Afterwards the Directive applies as everywhere else. In short: those, who do not know a system of institutionalized system of employees' information and consultation are not exposed to a shock-therapy, but get the chance of a smooth transition.

The mere existence of these Directives does not leave any doubt that the promotion of employees' involvement in company's decision-making has become an essential part of the Community's mainstreaming strategy in its social policy agenda. It has transgressed definitely the „point of no return". This policy is in line with the already mentioned Art. 27 of the Charter of Fundamental Rights of the EU, guaranteeing the workers' right to information and consultation. This has an important implication: countries with a tradition of exclusively adversarial structures have no longer a choice but to restructure their systems towards a concept of partnership and cooperation.

All these Directives have their weaknesses: they are unnecessarily complicated, not always consistent and above all very vague in their terminology. The Directive supplementing the Statute of the European Company as well as the Directive on a national framework for information and consultation have been watered down during the legislative process: the result is the lowest denominator. However, in assessing the importance of these measures for the future of industrial relations in the EU, these deficiencies should not be overstated. The decisive element is the fact that these instruments, taken as a whole, force all actors involved – trade unions and workers' representatives, employers' associations, employers and employees – to discuss and reflect on the potential of employees' information and consultation, and in the case of the Directive supplementing the Statute on the European Company even on workers' participation in company boards. Finally it has to be stressed that the Community's approach does not focus on introducing specific institutional patterns but simply stimulates and initiates procedures for the promotion of the idea of employees' involvement in management's decision-making.

4. Integration of Industrial Relations in an Enlarged EU

4.1. The Insufficiency of the mere Transposition of the Acquis Communautaire

In order to meet the Copenhagen criteria for accession the CEE States as well as all other candidate countries were required to transpose all EC legislation (the so-called acquis communautaire) in their respective legal systems. In view of the huge amount of such legislation this was a difficult task to be performed in a relatively short time. In general, the candidate countries – including the CEE States – had no problems to meet this precondition for accession. With the help of external experts (the so-called process of „screening") they succeeded to an admirable extent in transposing the EU law into their respective legal

structure[41]. However, the gap between the law in the books and the law in action as indicated above also plays a role in this context. The focus remains on the normative level. As long as the institutions and actors guaranteeing a satisfying implementation in actual practice are not available and as long as the necessary resources for implementation are lacking it would be illusionary to assume that mere transposition of EU law does have an effective impact on the reality of the CEE States[42]. The danger cannot be denied that it might well remain to be mere window-dressing.

As indicated above quite a few Directives (as for example those on working time or on health and safety, two areas where the CEE States are still lagging far behind the present EU average[43]) need the involvement of social partners and/or workers' representatives in order to be adequately implemented. This of course is not possible as long as the respective actors and instruments are still absent[44].

4.2. Social Dialogue and Collective Bargaining

In order to be able to participate in the cross-sectoral as well as in the sectoral social dialogues on European level there is a need for the respective structures in the national context. The same is true for the strategy of coordinated collective bargaining as described above. Here the deficits in the CEE States are significant. In particular social dialogue and collective bargaining at sectoral level are to be developed. If these intermediary structures are missing there will neither be an input to the European social dialogue from the CEE States, nor will they be able to adequately cope with the input provided by the social dialogue. Neither framework agreements concluded in the context of the European cross-sectoral social dialogue (like the one on tele-work) nor similar agreements or guidelines developed in the context of European sectoral social dialogues will have any relevance for the CEE States as long as there are no intermediary structures in place. And of course as long as trade unions and employers' associations do not have an appropriate organisational structure, they will not be able to play their respective roles in the mutual learning process, as it was sketched above by taking the example of employment policy. It cannot be denied that social partners and industrial relations in the CEE States are in danger to remain disconnected from the patterns established on European level[45]. Then the highly praised open method of coordination could

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[41] See S. Clauwaert / W. Düvel, The implementation of the social acquis communautaire in Central and Eastern Europe, ETUI Interim Report, European Trade Union Institute, Brussels, 2000

[42] M. Ladó / D. Vaughan-Whitehead (FN 6) 80

[43] ibidem

[44] ibidem

[45] This view is shared by M. Ladó / D. Vaughan-Whitehead (FN 6) 83

not work at all. The fight against this very danger is a challenge not only for the trade unions but also and in particular for the employers' associations. And it is of course also a challenge for the social partners of the present Member States and the present EU to support this development, as it was promised at the summit in Laeken when Belgium the last time had the Presidency of the EU.

In this context it should be mentioned that in the meantime particularly the trade unions have developed a significant amount of networks aiming at assistance and close cooperation. Already in 1993 the 'European Trade Union Forum for Cooperation and Integration' was founded. In addition there is for example the Baltic Sea Trade Union Network (BASTUN), where trade unions from Poland, Lithuania, Latvia and Estonia are closely cooperating with trade unions from Sweden, Norway, Finland and Denmark. Or based on the 'Interregional collective bargaining policy memorandum – co-operation networks of the trade unions', signed in Vienna in 1999, the metalworkers' trade unions of Germany, Austria, the Czech Republic, Slovakia, Slovenia and Hungary agreed on exchange of information and mutual support.[46]

4.3. Employees' Involvement in Management's Decision Making

As shown above employees' involvement in management's decision-making has not only become one of the core activities in the mainstream of the EC social policy. It furthermore has reached a point where Member States no longer can escape. The latest with the recent Directive on a framework of information and consultation the question is no longer whether the Member States may have such an institutional arrangement, the question merely is how they shape it. But even in this respect the leeway is narrowed down: all the topics mentioned by the Directive are to be covered and the requirements for adequate information and consultation schemes are to be met. There is no doubt that the arrangements established so far in the CEE States do not live up yet to these standards. It is of course up to the CEE States whether they prefer a system exclusively based on trade union representation or a dual system with special elected bodies in addition to the existing trade unions. It is also up to the CEE States whether they establish different structures for enterprises where trade unions are present and where they are absent. So far the Directive does not prescribe anything since it refers to workers' representatives according to national law and practice. However, it has to be stressed that the Directive is only adequately implemented if workers' representatives in the establishments and undertakings covered by the Directive are available. It should be added that

[46] For these and quite a few other examples see R. Langewiesche / A. Tóth, Introduction: Making unification work, in: R. Langewiesche / A. Tóth, The Unity of Europe – Political, Economic and Social Dimensions of EU Enlargement, Brussels 2001, 7 (65 – 68)

this implementation problem is not only a problem for the CEE States but also for quite a few old Member States of the present EU. There will be a unique opportunity to learn from each other by way of an intensive exchange of information.

However, the problem for the CEE States is not only confined to the question how to shape the pattern of information and consultation, but to develop a consistent and coherent multi-level system of industrial relations, in which employees' involvement in management's decision making has its proper place. It is of utmost importance to organise a rather clear-cut division of labour between the system of information and consultation in management's decision-making and collective bargaining. If there are too many overlaps, the industrial relations machinery will not be able to function properly, and it will not gain the acceptance of the trade unions. It is important to develop the respective systems in cooperation with the trade unions. Whether they already are in a position to fulfil this role, however, may well be doubted.

4.4. Conclusion

The CEE States are still in the stage of transformation as far as industrial relations are concerned. Systems of employees' involvement in management's decision-making are rather the exception than the rule. And where they exist they are weak. There is not yet a consistent

multi-level system of industrial relations. Collective bargaining is still a rudimentary phenomenon, mainly taking place on company level. Intermediary levels of collective bargaining and social dialogue are missing. The private sector to a great extent is lacking collective representation whatsoever.

In this situation the accession to the EU means a particular challenge for both: for the EU in their attempt to build up an integrated system of industrial relations and for the CEE States in their aspiration not to be disconnected from this EU pattern. Thereby, EU enlargement could play the role of a catalyst in this process. As shown above, there is a likelihood that it will accelerate and shape to a certain extent the dynamics of transformation. And this of course again will have an impact on the future structure of the EU arrangements. There is not a one way perspective but reciprocity. The optimistic view would be that thereby a mutual learning process is established for the benefit of both: the EU as well as the CEE States. This, however, is not a short-term, but a long-term project.

PRIVATRECHTSENTWICKLUNG IN DEN BALTISCHEN STAATEN

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Das Baltikum bis 1918

1. Im Jahre 1710 unterwarfen sich Livonien und Estland in einem Kapitulationsvertrag dem russischen Zarenreich. Der im Jahre 1721 geschlossene Friedensvertrag von Nystadt, der den Nordischen Krieg beendete, hat die Kapitulation der Stände und der Städte wieder festgelegt. Die Angliederung Kurlands an das Zarenreich im Jahre 1795, d.h. nach der dritten Teilung des polnisch-litauischen Doppelstaates, erfolgte auf die gleiche Weise.[1]

Der Einfluß der deutschen Pandektenwissenschaft in den – bis zum Jahre 1918 zu Rußland gehörigen – baltischen Gebieten wird in dem auf Deutsch verfaßten[2] *Liv-, Est- und Curländischen Privatrecht* vom Jahre 1864 deutlich. Das als Kodex redigierte *Liv-, Est- und Curländische Privatrecht* wurde als dritter Band des „Provinzialrechts des Ostseegouvernements" herausgegeben. Dieser umfangreiche, aus 4636 Artikeln bestehende Kodex war in Estland, Lettland und in manchen Gebieten des heutigen Litauens[3] noch geraume Zeit nach dem Ersten Weltkrieg gültig: In Lettland bis zum 1. Januar 1938, d.h. bis zur Verkündung des lettischen Zivilgesetzbuches, und in Estland bis Anfang der 1940-er Jahre.

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[1] Hinsichtlich der Privatrechtsentwicklung in Polen siehe Hamza G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján. (Die Entwicklung des europäischen Privatrechts. Entstehung der modernen Privatrechtsordnungen auf römischrechtlicher Grundlage)* Budapest, 2002. S. 76 f. und 169 ff. Siehe noch G. Hamza: *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn.* Budapest, 2002. S. 149 ff.

[2] Dieses Gesetzbuch wurde auch auf Russisch im Amtsblatt verkündet.

[3] Die Privatrechtsentwicklung Litauens, das Teil des polnisch-litauischen Doppelstaates war, folgte nicht der Rechtsentwicklung der übrigen Gebiete des heutigen Estland und Lettland.

2. Der öfters (in den Jahren 1890, 1912, 1913 und 1914) überarbeitete Kodex wurde von Friedrich Georg von Bunge[4] (1802–1897), dem namhaften Pandektisten und Professor der Universität von Dorpat (Tartu, ab dem Jahre 1893 Jurjev), erstellt. Als Vorarbeit zu dem *Liv-, Est- und Curländischen Privatrecht* diente Bunges rechtsgeschichtliches Werk *Einleitung in die liv-, esth- und curländische Rechtsgeschichte und Rechtsquellen* (Reval, 1849).

Das *Liv-, Est- und Curländische Privatrecht* gliedert sich in familien-, sachen-, erb- und schuldrechtliche Teile. Er weicht aber insofern vom Pandektensystem ab, als ihm kein Allgemeiner Teil vorangestellt ist. Der Kodex spiegelt feudale Rechtsideen wieder, vor allem im Bereich des Sachenrechts. Das *Liv-, Est- und Curländische Privatrecht* regelt auch das geteilte Grundeigentum; diese feudale Form des Grundeigentums blieb auch nach der russischen Bodenreform erhalten. Gleichwohl ist das Werk wesentlich moderner als das in den lettischen Gebieten gültige Zehnte Buch des *Svod Zakonov*, das die privatrechtlichen Verhältnisse regelte.

3. Im Gegensatz zu den Territorien, die heute zu Estland und Lettland gehören, wurde in den meisten litauischen Gebieten das vor der russischen Eingliederung bestehende Recht nicht beibehalten. Nach der Einführung des *Svod Zakonov* in den meisten Gebieten des Zarenreiches wurde diese Kompilation auch auf den litauischen Gebieten in Kraft gesetzt. (Es sei vermerkt, daß der russische *Svod Zakonov* auf gewissen Gebieten des russischen Zarenreiches, so z.B. in manchen Gebieten Polens und der Ukraine, Finnland, Bessarabien und auf dem Baltikum nicht in Kraft gesetzt wurde.)

4. Die Rezeption des römischen Rechts, d.h. die aber keine *receptio in complexu* bzw. *receptio in globo* war,[5] wurde auf den Gebieten des heutigen Lettland und Estland unter Vermittlung der deutschen, hauptsächlich der sächsischen Siedler vollzogen, die das deutsche Stadtrecht mit sich brachten. Carl Eduard Erdmann (1841-1898), der zwischen den Jahren 1872-1897 als Nachfolger von Carl Christoph Leopold von Rummel (1812-1887) Professor an der Universität von Dorpat war, verfaßte das vierbändige Werk *System des Privatrechts der Ostseeprovinzen Liv- Est- und Kurland*, das bedeutenden Einfluß auf die damalige Rechtspraxis ausübte. Dieses Werk ist bis heute das einzige, das das *Liv-, Est- und Curländische Privatrecht* umfassend und mit wissenschaftlichem Anspruch darstellt.

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[4] Friedrich Georg von Bunge war Verfasser des Werkes *Geschichte des Gerichtswesens und Gerichtsverfahrens in Liv-, Est- und Curland* (Reval, 1874). Über den Rechtsgelehrten von Bunge siehe W. Greffenhagen: Dr. jur. Friedrich Georg v. Bunge. Reval, 1891.

[5] In Bezug auf die Frage der Rezeption des römischen Rechts siehe Földi A.—Hamza G.: *A római jog története és institúciói (Geschichte und Institutionen des römischen Rechts)* Zehnte verm. und überb. Auflage. Budapest, 2005. S. 107 ff.

5. Die Universität von Dorpat (*Academia Gustaviana*) wurde vom schwedischen König Gustav Adolf II. (1594–1632) gegründet. Der schwedische König unterzeichnete die Gründungsurkunde am 30. Juli 1632 bei Nürnberg. Die Unterrichtssprache an der Universität war ab dem Jahre 1802, d.h. ab dem Jahre der Wiederaufnahme des Unterrichts, bis zum Ende des 19. Jahrhunderts deutsch. Die Unterrichtssprache wurde aber allmählich (immerhin neben der deutschen Sprache) russisch. Die Universität verlor im Jahre 1889 – gleich den anderen Universitäten im russischen Zarenreich – ihre Autonomie. Die estnische Sprache als Unterrichtssprache wurde erst nach dem Ende des Ersten Weltkrieges eingeführt.

Der Unterricht des römischen Rechts spielte immer eine wichtige Rolle an der juristischen Fakultät der Universität zu Dorpat. Besondere Erwähnung verdient der Romanist Ernst Ein (1898-1976), der im Jahre 1933 auch das Amt des Justizministers innehatte. Ernst Ein war Schüler des hervorragenden italienischen Romanisten Pietro Bonfante (1864-1932). Sein Forschungsinteresse war in erster Linie auf die Fragen des Miteigentums (*condominium*) gerichtet.[6]

Die heute in Estland liegende Stadt Dorpat selbst war zur Zeit der schwedischen Herrschaft auch in juristischer Hinsicht die bedeutendste Stadt im Baltikum. Dorpat war Sitz des Hofgerichts, außerdem das Verwaltungszentrum Livlands.

Estland

6. Estland wurde im Jahre 1918 von Rußland unabhängig. In der Zwischenkriegszeit galt das *Liv-, Est- und Curländische Privatrecht* fort.

Der Entwurf des Zivilgesetzbuchs vom Jahre 1936, der stark von den pandektistischen Traditionen geprägt war, trat nicht in Kraft. Nicht lange nach der Erlangung der Unabhängigkeit, im Jahre 1923, wurde im Rahmen des Justizministeriums die Vorbereitungskommission für die Erstellung eines Zivilgesetzbuches aufgestellt, deren Präsidenten Jüri Uluots (Professor für Privatrecht an der Universität von Tartu), und Jüri Jaakson (Anwalt und Politiker) waren. Die Redaktionsmitglieder haben den Kodex von Georg Friedrich von Bunge, den Entwurf des bürgerlichen Gesetzbuches für das zaristische Rußland, das deutsche BGB, das schweizerische Zivilgesetzbuch bzw. das schweizerische Obligationenrecht, den französischen *Code civil*, die ungarischen BGB-Entwürfe einschließlich des Entwurfes vom Jahre 1928 und die polnischen Teilentwürfe für die Privatrechtskodifikation berücksichtigt.

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[6] Eins Studie über das Miteigentum mit dem Titel *Le azioni dei condomini*, erschienen im Bullettino dell'Istituto di Diritto Romano 39 (1931), ist heute noch wegweisend.

Die ersten Kapitel des estnischen Zivilgesetzbuchentwurfes wurden in den Jahren 1935 und 1936 fertiggestellt. Die Regierung hat den Entwurf im Jahre 1939 dem estnischen Parlament zur Diskussion gestellt. Das estnische Parlament rief eine parlamentarische Kommission ins Leben, die im Jahre 1940 den aus 2135 Paragraphen bestehenden Entwurf des BGB mit geringfügigen Änderungen gutgeheißen hat. Die Annahme des Entwurfs scheiterte an der Angliederung Estlands an die Sowjetunion.

7. Nach Angliederung Estlands an die Sowjetunion wurde durch eine Verordung des Präsidiums des Obersten Sowjets der Sowjetunion das *Liv-, Est- und Curländische Privatrecht* mit Wirkung zum 16. Juni 1940 außer Kraft gesetzt und das sowjetrussische Zivilgesetzbuch vom Jahre 1922 zusammen mit den anderen Gesetzbüchern (so z.B. mit dem Familienrechtskodex) eingeführt.

Im Jahre 1961 wurden auch in Estland die Grundlagen der Zivilgesetzgebung der Union der SSR und der Unionsrepubliken (*Osnovy Graždanskogo Zakonodat'elstva*) als normative Gesetzesgrundlage verkündet. Die Grundlagen ersetzen weitgehend das Zivilgesetzbuch vom Jahre 1922. Die Grundlagen bildeten weitgehend – gleich den anderen Sowjetrepubliken – die Basis des estnischen Zivilgesetzbuches vom Jahre 1964.

Seiner Struktur und seiner Terminologie nach war das Zivilgesetzbuch der Estnischen Sozialistischen Sowjetrepublik vom Jahre 1964 pandektistisch orientiert. Dieses Gesetzbuch unterschied sich nur geringfügig vom Zivilgesetzbuch der russischen Föderation vom demselben Jahre und den Zivilgesetzbüchern der anderen Sowjetrepubliken.

Nachdem Estland im Jahre 1991 seine Unabhängigkeit wiedererlangt hatte, begann man mit der Reform des Privatrechts. Die Grundlagen der Zivilgesetzgebung der Sowjetunion vom 31. Mai 1991 hatten bzw. haben in Estland keine Geltung.

8. Das *Liv-, Est- und Curländische Privatrecht* wurde zwar nicht wieder in Kraft gesetzt, wurde aber vor allem im Bereich der Reprivatisierung des Eigentums als eine Art subsidiäre Rechtsquelle betrachtet.

Man zog zunächst, dem Beispiel Lettlands folgend, die Promulgation des damals aus politischen Gründen nicht in Kraft gesetzten Zivilgesetzbuch-Entwurfes aus dem Jahre 1940 in Erwägung. Das estnische Justizministerium war ursprünglich für die Annahme in revidierter Fassung dieses Entwurfes. Im Oktober 1992 führte die vom Justizministerium beauftragte Kommission die nötigen Revisionsarbeiten durch. Die gleiche Kommission nahm aber von ihrem früheren Standpunkt Abstand und freundete sich mit der Idee der Erstellung eines neuen, modernen Zivilgesetzbuches an.

Der Gesetzgeber entschloß sich aber dazu, daß eine *teilweise* Kodifikation des Zivilrechts, die im Einklang mit den Bestimmungen der im Jahre 1992 verkündeten Verfassung steht, erfolgen sollte. Der aus 180 Paragraphen bestehende Allgemeine Teil des Zivilgesetzbuchs wurde vom Parlament (*Riigikogu*) im Jahre 1994 verabschiedet. Er ist eindeutig vom pandektistischen Denkmodell geprägt. Das aus 365 Artikeln bestehende Gesetz über das Sachenrecht wurde schon ein Jahr vorher, im Jahre 1993, in Kraft gesetzt. Das Familiengesetz stammt aus dem Jahre 1994, das Gesetz über das Erbrecht wurde im Jahre 1996 verabschiedet. Das Gesetz über das Arbeitsrecht wurde bereits im Jahre 1992 verabschiedet.

Teile des Allgemeinen Teils des Schuldrechts waren zunächst im Gesetz über den Allgemeinen Teil des Zivilrechts enthalten. Im Bereich des Besonderen Teils des Schuldrechts waren die Normen des Besonderen Teils des Schuldrechts des Zivilgesetzbuchs der Estnischen Sozialistischen Sowjetrepublik vom Jahre 1964 gültig. Die Regierung hat im November 1998 den Entwurf eines umfangreichen, aus mehr als 1200 Paragraphen bestehenden Gesetzes über das Schuldrecht diskutiert. Dieses Gesetz, der im Jahre 1999 vom Parlament angenommen wurde und am 1. Januar 2000 in Kraft trat, hat sowohl den Allgemeinen Teil wie den Besonderen Teil des Schuldrechts.

9. Mit der Annahme des Gesetzes über das Schuldrecht ging der Prozeß der Kodifikation des Zivilrechts noch nicht zu Ende: Die Vorbereitung der Kodifikation des internationalen Privatrechts (dies wäre gleichsam das 6. Buch des estnischen Zivilgesetzbuchs gewesen) ist immer noch im Gange. Bis dahin wird das IPR im fünften Teil des Gesetzes über den Allgemeinen Teil geregelt.

Die Kodifikatoren berücksichtigen bei der Erstellung der verschiedenen Teile der estnischen Zivilgesetzbuches vor allem folgende Quellen: das deutsche BGB, das schweizerische Zivilgesetzbuch bzw. Obligationenrecht, das neue niederländische Bürgerliche Gesetzbuch, den italienischen *Codice civile* vom Jahre 1942, den neuen *Code civil* von Québec vom Jahre 1994 und die neuere französische und dänische Zivilrechtsgesetzgebung. Erwähnung verdient, daß die Redaktoren den *Louisiana Civil Code* und dessen Modifikationen in ihre Arbeiten miteinbezogen.

10. Das aus 541 Paragraphen bestehende Handelsgesetzbuch vom Jahre 1995 ist trotz seines Namens (*Äriseadustik*) nicht als umfassendes Handelsgesetzbuch im herkömmlichen Sinne zu betrachten, da es außer den allgemeinen Regeln des Handelsrechts nur die verschiedenen Formen der Handelsgesellschaften regelt. In Estland wird die Idee der Erschaffung eines *code unique* nicht angenommen. Das monistische Konzept kommt insoweit zur Geltung, als es keine spezielle, von der zivilrechtlichen Regelung unterschiedliche Regelung im Hinblick auf Handelsverträge gibt. Das estnische Handelsgesetzbuch wurde zuletzt im März und im Juni 2000 modifiziert.

11. Ein herausragender Vertreter der Zivilrechtswissenschaft in Estland war in der Zwischenkriegszeit Elmar Ilust (1898-1981), Professor an der Universität von Tartu (früher Dorpat). Ilust verfaßte das erste estnische Lehrbuch des Zivilrechts, das im Jahre 1930 erschienen ist. Dieses Lehrbuch war das letzte Lehrbuch im ganzen Baltikum, das das Zivilrecht auf der Grundlage des *Liv-, Est- und Curländischen Privatrechts* darstellte.

Lettland

12. Der Einfluß der deutschen Pandektenwissenschaft zeigte sich in Lettland besonders stark in der Zwischenkriegszeit. Dies ist besonders am Bürgerlichen Gesetzbuch vom Jahre 1937 ersichtlich. Das aus 2400 Paragraphen bestehende lettische BGB wurde unter der Regierung des Staats- und Ministerpräsidenten Karlis Ulmanis redigiert und am 1. Januar 1938 in Kraft gesetzt. Die Redaktoren des lettischen Zivilgesetzbuches berücksichtigten daneben die schweizerische Zivilrechtskodifikation bzw. deren im Jahre 1936 erfolgte Revision.

Die Struktur des Kodex ist die folgende: Einleitende Bestimmungen (§§ 1-25), Familienrecht (§§ 26-381), Erbrecht (§§ 382-840), Sachenrecht (§§ 841-1400) und Schuldecht (§§ 1401-2400). Der aus vier Büchern bestehende Kodex hat demnach keinen Allgemeinen Teil. Die deutsche Pandektenwissenschaft beeinflußte nur beschränkt die Regelung der einzelnen Rechtsinstitute. Für diesen eher geringen Einfluß der Pandektistik hat der Umstand eine erhebliche Rolle gespielt, daß die Redaktoren die damaligen (weniger entwickelten) sozialen und wirtschaftlichen Verhältnisse betont berücksichtigten. Dies spiegelt sich unter anderem darin wieder, daß die auf das geteilte Bodeneigentum bezogenen Regelungen erst nach der Einführung des Zivilgesetzbuches, nämlich in einem im Dezember 1938 verabschiedeten Gesetz, außer Kraft gesetzt wurden.

13. Nach Angliederung Lettlands an die Sowjetunion wurde durch eine Verordung des Präsidiums des Obersten Sowjets der Sowjetunion das sowjetrussische Zivilgesetzbuch vom Jahre 1922 samt anderen Gesetzbüchern (so z.B. mit dem Familienrechtskodex) in Kraft gesetzt.

Im Jahre 1961 wurden die Grundlagen der Zivilgesetzgebung der Union der SSR und der Unionsrepubliken (*Osnovy Graždanskogo Zakonodat'elstva*) verkündet, welche normative Kraft besaßen. Die Grundlagen bildeten weitgehend – gleich den anderen Sowjetrepubliken – die Basis des neuen, im Jahre 1964 in Kraft getretenen Zivilgesetzbuches.

Der Kodex vom Jahre 1964 unterschied sich nur geringfügig vom Zivilgesetzbuch der russischen Föderation vom Jahre 1964 und den Zivilgesetzbüchern der anderen Sowjetrepubliken. (Ein geringfügiger Unterschied war z.B., daß

das lettische Zivilgesetzbuch das Rechtsinstitut der Geschäftsführung ohne Auftrag (*negotium gestum*) regelte.) Seiner Struktur und Terminologie nach war also auch das Zivilgesetzbuch der Lettischen Sozialistischen Sowjetrepublik pandektistisch orientiert.

14. Nach dem Wiedererlangen der Unabhängigkeit Lettlands im Jahre 1991 trat das Gesetzbuch vom Jahre 1937 mit geringfügigen Abänderungen stufenweise wieder in Kraft.[7] Der erbrechtliche und sachenrechtliche Teil wurde am 1. September 1992, der schuldrechtliche Teil am 22. Dezember 1992 und der familienrechtliche Teil am 1. September 1993 in Kraft gesetzt. Die Änderungen betrafen vor allem das Familien- und das Erbrecht. Die Grundlagen der Zivilgesetzgebung der Sowjetunion vom 31. Mai 1991 wurden nicht in Kraft gesetzt.

15. In der Rechtswissenschaft hat in Lettland in der Zwischenkriegszeit die in der römischrechtlichen Tradition wurzelnde Pandektistik eine bedeutende Rolle gespielt. Vasil Sinaiska (1876-1949), der zwischen 1918 und 1944 an der Universität von Riga römisches Recht unterrichtete, war ein international anerkannter Repräsentant seines Faches. Früher, vor 1918, nahm er eine Professur zunächst in Dorpat, später in Kiew war.

In der Zwischenkriegszeit kam es nicht zur Verabschiedung eines Handelsgesetzbuches. Erwähnung verdient, daß das im Dezember 1937 verabschiedete Gesetz über die Aktiengesellschaften zusammen mit dem Zivilgesetzbuch vom Jahre 1937 in Kraft gesetzt wurde. Dieses Gesetz setzte den ersten Teil des Zehnten Buches des *Svod Zakonov* und die Regeln eines im Jahre 1836 promulgierten russischen Gesetzes außer Kraft. Hinsichtlich der Rechtsentwicklung im Handelsrecht, nach Erlangung der Unabhängigkeit sind das Gesetz über die Handelsgesellschaften vom 5. Februar 1991, das Gesetz über die Gesellschaften mit beschränkter Haftung vom 1. Februar 1991, das Gesetz über die Aktiengesellschaften vom 18. Mai 1993 und das Gesetz über die Insolvenz von Unternehmen und Gesellschaften vom 12. Dezember 1996 zu erwähnen.

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[7] Diese originelle Lösung, d.h. die Wiedereinführung der Gesetze aus der Zwischenkriegszeit, wurde auch im Hinblick auf die Verfassung angewandt: Die Verfassung vom Jahre 1922 wurde durch das lettische Parlament (*Saeima*) im Jahre 1993 wieder in Kraft gesetzt. Im Jahre 1997 wurde diese Verfassung in erheblichem Maße geändert. Vgl. I. Feldmanis: Die Erfahrungen mit parlamentarischer Demokratie und autoritärer Herrschaftsform (1918-1940) in Lettland. In: B. Meissner – D. A. Loeber – C. Hasselblatt (Hrsg.): Der Aufbau einer freiheitlich-demokratischen Ordnung in den baltischen Staaten. Staat. Wirtschaft. Gesellschaft. Hamburg, 1995, S. 53-60 und C. Taube: Constitutionalism in Estonia, Latvia and Lithuania. A Study in Comparative Law. Uppsala, 2001. Aus der älteren Literatur siehe M. M. Laserson: Die Verfassungsentwicklung Lettlands. Jahrbuch des öffentlichen Rechts der Gegenwart 11 (1922) S. 218-226.

16. Zu einer Gesamtkodifikation des Handelsrechts ist es bis heute nicht gekommen. In Lettland wurde dem monistischen Konzept nicht Rechnung getragen. Der Gesetzgeber hat die Idee der Erschaffung eines *code unique* nicht angenommen.

Litauen

17. Das russische Zarenreich gewann seit Peter I. (dem Großen) und Katharina II. (der Großen) wachsenden Einfluß auf die politische Entwicklung des polnisch-litauischen Doppelreiches (die polnisch-litauische Konföderation). Rußland gelang es, nach den drei Teilungen des polnisch-litauischen Staates (1772, 1793 und 1795) ganz Litauen für sich zu sichern. Es entstanden die russischen Gouvernements Wilna, Kowno sowie Suwalki, das erst nach vorübergehender preußischer Herrschaft (Neu-Ostpreußen 1795–1807) hinzukam.

Litauen erlangte im Jahre 1918 seine Unabhängigkeit, die zwei Jahre später auch von Sowjetrußland anerkannt wurde.

Erwähnung verdient, daß das ab dem Jahre 1923 zu Litauen gehörige Memelgebiet (Klaipeda-Region) seine Autonomie im rechtlichen Bereich bewahren konnte (das Recht der Klaipeda-Region).

18. Nachdem am 21. Juli 1940 die Sowjetrepublik Litauen ausgerufen worden war, wurde Litauen am 3. August desselben Jahres in die Sowjetunion eingegliedert. Am 11. März 1990 proklamierte Litauen seine Unabhängigkeit; aufgrund dessen Litauen seine Unabhängigkeit am 29. Juli 1991 wiedererlangt hat.

Im Territorium des heutigen Litauen galt, im Gegensatz zu Estland und Lettland, nicht das *Liv-, Est- und Curländische Privatrecht*, sondern ab dem Jahre 1835 der *Svod Zakonov*. Nach dem Jahre 1918 blieb der *Svod Zakonov* mit Änderungen weiterhin in Kraft. Die Modernisierung des Rechtssystems erfolgte durch Teilgesetzgebung. In der Zwischenkriegszeit kam es zu keiner Verabschiedung eines Zivilgesetzbuches. In der Doktrin kam der Pandektenwissenschaft eine immer bedeutendere Rolle zu. Dabei spielte auch der Unterricht des römischen Rechts eine erhebliche Rolle. Der aus Ungarn stammende namhafte Romanist, Zivilist und Rechtsvergleicher Elemér Balogh (1881–1955) unterrichtete an der Universität Kaunas, der damaligen Hauptstadt, römisches Recht und Zivilrecht.[8]

[8] Im Hinblick auf das wissenschaftliche Oeuvre von Elemér Balogh siehe G. Hamza: Balogh Elemér (Elemér Balogh) In: Magyar Jogtudósok I. Budapest, 1999, S. 137-146.

19. Nach Angliederung Litauens an die Sowjetunion wurde durch eine Verordnung des Präsidiums des Obersten Sowjets der Sowjetunion das sowjetrussische Zivilgesetzbuch vom Jahre 1922 mitsamt anderen Gesetzbüchern (so z.B. mit dem Familienrechtskodex) in Kraft gesetzt.

Im Jahre 1961 wurden auch in Litauen die Grundlagen der Zivilgesetzgebung der Union der SSR und der Unionsrepubliken (*Osnovy Graždanskogo Zakonodat'elstva*) als normative Gesetzesgrundlage verkündet. Die Grundlagen ersetzten weitgehend das Zivilgesetzbuch vom Jahre 1922. Die Grundlagen bildeten weitgehend – gleich den anderen Sowjetrepubliken – die Basis des neuen litauischen Zivilgesetzbuches vom Jahre 1964.

Seiner Struktur und seiner Terminologie nach war das Zivilgesetzbuch der Litauischen Sozialistischen Sowjetrepublik vom Jahre 1964 pandektistisch orientiert. Dieses Gesetzbuch unterschied sich nur geringfügig vom Zivilgesetzbuch der russischen Föderation vom demselben Jahre und den Zivilgesetzbüchern der anderen Sowjetrepubliken. Das Zivilgesetzbuch wurde nach Erlangung der Unabhängigkeit mehrfach reformiert. Die Grundlagen der Zivilgesetzgebung der Sowjetunion vom 31. Mai 1991 hatten bzw. haben keine Geltung.

20. Bereits am Anfang der 1990-er Jahre hat man in Litauen mit der Vorbereitung eines neuen, marktwirtschaftlich orientierten Zivilgesetzbuches begonnen. Der Erste Entwurf entstand im Jahre 1994, die überarbeitete Variante wurde im Jahre 1996 veröffentlicht. Die endgültige Fassung wurde am 18. Juli 2000 vom litauischen Parlament (*Seimas*) gebilligt. Das neue Zivilgesetzbuch trat am 1. Juli 2001 in Kraft. Unter den Redaktoren spielte der namhafte Professor an der Universität Vilnius, V. Mikelenas, die entscheidende Rolle. Bei der Kodifikation wurden vor allem der italienische *Codice civile* vom Jahre 1942, das neue Zivilgesetzbuch von Québec vom Jahre 1994 und das neue niederländische Bürgerliche Gesetzbuch als Modell herangezogen. Berücksichtigt wurden auch der französische *Code civil*, mit seinen Modifikationen, und das deutsche BGB. In diesem Gesetzbuch findet man eine einheitliche Regelung im Hinblick auf das Vertragsrecht ohne Unterscheidung zwischen zivilrechtlichen und handelsrechtlichen Verträgen (monistisches Prinzip). Die verschiedenen Formen der Handelsgesellschaften werden unter den verschiedenen Formen der juristischen Personen geregelt.

21. Das Gesetzbuch über die Ehe und Familie vom Jahre 1969 wurde zunächst im Jahre 1993 durch ein neues Gesetz ersetzt. Mit der Einführung des Bürgerlichen Gesetzbuches wurde auch dieses Gesetz außer Kraft gesetzt und das Ehe- und Familienrecht in das Dritte Buch des neuen Zivilkodex inkorporiert.

22. In der Zwischenkriegszeit wurde in Litauen kein vollständiges Handelsgesetzbuch promulgiert. Das am 5. Mai 1937 verabschiedete Gesetz bezog sich ausschließlich auf das Handelsregister. Nach der Wiedererlangung der Unabhängigkeit wurde das Handelsrecht in einem eigenständigen Handelsgesetz geregelt, das im Jahre 1995 verabschiedet wurde. Das Gesetz über die Aktiengesellschaft stammt aus dem Jahre 1994. Nach der Inkraftsetzung des Bürgerlichen Gesetzbuches am 1. Juli 2001 sind darin auch die Handelsverträge, einheitlich mit den zivilrechtlichen Verträgen, geregelt. In Litauen verfolgt der Gesetzgeber dementsprechend das monistische Prinzip (*concept moniste*). Im Einklang mit diesem Prinzip werden nur die speziellen Vorschriften im Hinblick auf die Handelsgesellschaften in separaten Gesetzen geregelt.

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RESÜMEE

Privatrechtsentwicklung in den baltischen Staaten

GÁBOR HAMZA

Auf dem Gebiet der nach dem I. Weltkrieg unabhängig gewordenen Baltischen Staaten widerspiegelt das deutschsprachige, aber auch in russischer Sprache amtlich veröffentlichte *Liv-, Est- und Curländische Privatrecht,* das in Lettland (bis 1. Januar 1938) und in Estland sogar noch eine geraume Zeit nach dem I. Weltkrieg (bis 1945) in Kraft war, die Wirkung der deutschen Pandektistik.

Den Auftrag zur Verfassung des Kodexes erhielt 1857 Friedrich Georg von Bunge (1802–1897). Das Gesetzbuch besteht aus den Teilen Familien-, Sachen-, Erb- und Schuldrecht, enthält aber keinen Allgemeinen Teil, und insofern weicht es vom Pandektensystem ab. Das sachenrechtliche Teil des Kodexes widerspiegelt Traditionen des feudalistischen Rechts.

Die Quelle des Privatrechts war in Estland zwischen den beiden Weltkriegen das *Liv-, Est- und Curländische Privatrecht.* Es kam jedoch nicht zur Schaffung eines Zivilgesetzbuches.

Nach der Eingliederung Estlands in die Sowjetunion wurde gemäß der Anordnung des Obersten Sowjets der Sowjetunion das Sowjetrussische Zivilgesetzbuch – zusammen mit anderen Gesetzbüchern, unter anderen zum Beispiel dem Familienrechtlichen Kodex – in Kraft gesetzt. Auf die gleiche Weise trat das Sowjetrussische Zivilgesetzbuch auch in Lettland und in Litauen in Kraft.

Nachdem Estland 1991 seine Souveränität wiedererlangt hatte, wurde das *Liv-, Est- und Curländische Privatrecht* nicht in Kraft gesetzt.

Der Prozess der zivilrechtlichen Gesetzgebung begann im Einklang mit den Bestimmungen der 1992 verkündeten Verfassung mit der Teilkodifikation des Zivilrechts. Der auf pandektistischen Grundsätzen beruhende Allgemeine Teil des Bürgerlichen Gesetzbuches wurde 1994 verabschiedet. Der Allgemeine Teil, der bezüglich der Vertretung eine sehr eingehende Regelung enthält, wurde hinsichtlich der juristischen Personen 1995 geändert.

Zur Inkraftsetzung des Gesetzes über das Sachenrecht kam es ein Jahr früher, 1993. Das Familiengesetz wurde 1994 verkündet, während das Gesetz zur Regelung des Erbrechts 1996 angenommen wurde. Einzelne Bestimmungen der allgemeinen Vorschriften des Schuldrechts sind im Allgemeinen Teil des Bürgerlichen Gesetzbuches enthalten.

Die Kodifizierung des Zivilrechts wurde aber mit der Annahme des Gesetzes zur Regelung des Schuldrechts noch nicht abgeschlossen. Das Handelsgesetzbuch (*Äriseadustik*) enthält neben der Regelung der Form einzelner Handelsgesellschaften auch die allgemeinen Regeln des Handelsrechts.

In Lettland kam es in der Zeit zwischen den beiden Weltkriegen, 1937, zur Verkündung des am 1. Januar 1938 in Kraft getretenen Bürgerlichen Gesetzbuches. Dieses Gesetzbuch aus 2400 Paragrafen bzw. vier Büchern enthält keinen Allgemeinen Teil. Die Pandektistik beeinflusste das Bürgerliche Gesetzbuch Lettlands nur im Bereich der Regelung gewisser Rechtsinstitute.

Das Handelsrecht wurde in Lettland bislang noch nicht neu kodifiziert. Die Handelsgesellschaften sind in selbständigen Gesetzen geregelt.

Nach Erlangung der Unabhängigkeit kam es in Litauen zur Vorbereitung des neuen, den Anforderungen der Marktwirtschaft angepassten Bürgerlichen Gesetzbuches. Das Parlament Litauens verabschiedete am 18. Juli 2000 den endgültigen Text des Bürgerlichen Gesetzbuches.

Die Autoren des auf einem monistischen Konzept beruhenden Kodexes berücksichtigten das Bürgerliche Gesetzbuch Italiens aus 1942, das neue Bürgerliche Gesetzbuch Québecs und das neue Bürgerliche Gesetzbuch der Niederlande. Gleichzeitig beachteten sie den französischen *Code civil,* sowie auch das deutsche BGB.

Das 1969 verabschiedete Gesetz über Ehe und Familie wurde durch ein in 1993 geschaffenes Gesetz außer Kraft gesetzt. Mit Annahme des neuen Bürgerlichen Gesetzbuches wurde auch dieses Gesetz außer Kraft gesetzt, und das Ehe- bzw. Familienrecht ist derzeit im dritten Buch des Bürgerlichen Gesetzbuches geregelt. Das Handelsrecht ist in 1995 verabschiedeten Gesetz über das Handelsrecht geregelt. Das Gesetz zur Regelung der Aktiengesellschaften wurde 1994 verabschiedet.

SUMMARY

Development of Private Law in the Baltic States

GÁBOR HAMZA

In the Baltic States following the First World War, when those States assumed independence, private law was under the influence of German pandectistics (*Pandektenwissenschaft*). The code *Liv-, Est- und Curländisches Privatrecht* was originally written in German, but it was officially promulgated in Russian as well. In Latvia it was in force until 1 January 1938 and in Estonia until 1945. Friedrich Georg von Bunge (1802-1897) was commissioned to draft that code in 1857. It consists of the following divisions: family law, property law, inheritance law and contract law. It differs from the pandectic system inasmuch as it involves no General Part. The chapter on property law is based on feudal traditions.

During the interwar period the *Liv-, Est- und Curländisches Privatrecht* was the source of private law in Estonia. However, no civil code was enacted there. Following the Soviet annexation of Estonia, as decreed by the Presidium of the Supreme Soviet of the Soviet Union, the Soviet-Russian Civil Code was enacted, alongside other codes of law, as for instance the code of family law. The Soviet-Russian Civil Code was also enacted in Lithuania and Latvia. The *Liv-, Est- und Curländisches Privatrecht* was enacted in Estonia after that country regained sovereignty, that is, after 1991. Legislation in the field of civil law began with the partial codification of civil law, in accordance with the Constitution, which was promulgated in 1992. The General Part of the Civil Code, which relies on pandectist traditions, was enacted in 1994. It includes detailed provisions on agency. In 1995, the rules from the General Part, which refer to legal entities, were amended. The Property Law Act was enacted a year earlier, in 1993. The Act on Family Law was promulgated in 1994, and the Act on Inheritance Law in 1996. Certain provisions from the General Part of contract law can be found in the General Part of the Civil Code. The enactment of the Act on Contract Law did not mean the completion of the codification of civil law. The Code of Commercial Law (*Äriseadustik*) covers the various forms of companies and the general rules of commercial law.

In Latvia the Civil Code was promulgated between the two world wars, in 1937, and it came into effect on 1 January 1938. That code consists of four volumes and 2400 articles, however, it includes no General Part. Pandectistics influenced the Latvian Civil Code only in the area of certain legal institutions. In Latvia commercial law has not been re-codified yet. There are separate laws to regulate the various business associations.

In Lithuania the preparation of a new Civil Code, one that satisfies the requirements of market economy, began after regaining national independence. The Lithuanian Parliament enacted the final version of the Civil Code on 18 July 2000. The Lithuanian Civil Code was conceived along monistic principles, and its framers took into consideration the Italian Civil Code of 1942, the new Civil Code of Québec and the new Civil Code of The Netherlands. They also found inspiration in the *Code Civil* of France and the *BGB* of Germany. The Act on Marriage and Family Affairs of 1969 was abrogated by a law, enacted in 1993. When the Civil Code was adopted, that latter law was also repealed. Presently the third volume of the Civil Code regulates marriage and family affairs. Commercial law is regulated by the Act on Commercial Law, adopted in 1995. In 1994, a law was enacted on companies limited by shares.

HERAUSBILDUNG DER SOG. „VOLKSDEMOKRATISCHEN" RECHTSGRUPPENREGION IN OST-MITTEL-EUROPA

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Die europäische sog. „volksdemokratische" Umgestaltung

Bei der Erörterung der Staats- und Rechtsentwicklung der sozialistischen Länder denkt man auch heute primär an die relevanten historischen Erfahrungen, die sich nach dem zweiten Weltkrieg in der jüngsten Entwicklung der mittel- und ost- bzw. südosteuropäischen Gesellschaften ergaben. In Wahrheit jedoch liegen die Ursprünge in viel früheren Zeiten, zugleich sind sie ausserordentlich komplex und kompliziert. Der gesamte historische Erscheinungskomplex, der sich in der Gesamtheit der europäischen Rechtsgruppenregion bzw. ihren Unterregionen äussert, ist nämlich in der verhältnismässig frühen Krise der Gesellschaften verwurzelt, die den schwächsten Punkt des modernen Kapitalismus bildeten. Infolge dieser Krise reiften die bis dahin unbekannten Formen der gesellschaftlichen Revolutionen.

Als Gemeinplatz mutet es heute schon an, wenn gesagt wird, dass die historischen Voraussetzungen der Entfaltung der europäischen sozialistischen Rechtssysteme auf die direkten bzw. indirekten Wirkungsfaktoren der Ergebnisse der Grossen Oktober-revolution zurückgeführt werden müssen. Die reichlich abgenutzte Formulierung birgt jedoch auch heute die komplizierte historische Wahrheit, dass die bedeutendste gesellschaftliche Revolution der neueren Zeit weltweite Wirkungen auf die staatlich organisierte menschliche Gesellschaft ausübte und bestimmte determinative Prozesse gerade in jener Rechtsgruppen-Region auslöste, deren Krise an der Schwelle des 20. Jahrhunderts herangereift war. Die Rechtsentwicklung des preussisch-deutschen, des österreichisch-ungarischen und des russischen Reiches bzw. die sich verschärfende Krise der mittel- und osteuropäischen bourgeoisen Rechtsgruppen-Region, die sich im Zuge verspäteter kapitalistischen Wandlungsprozesse herausgebildet hatte, waren also der Hintergrund für die beispiellosen historischen Möglichkeiten, für deren Verwirklichung die Oktoberrevolution den Weg eröffnete.

Allgemein bekannt ist, dass die betreffende bürgerliche Rechtsgruppe von den modernen Rechtssystemen die erste war, die sich von vornherein als Ergebnis einer ganze Völker erfassenden gesellschaftlichen Revolution herausbildete. Die frühe Krise der betreffenden Rechtsgruppe äusserte sich auch darin, dass die unlösbaren inneren Widersprüche vom Rhein bis zum Ural wirkten und die gesellschaftlichen Erschütterungen (Revolutionen) binnen kurzem ein solches Ausmass erreichten, dass sie die betroffenen multinationalen Reiche ausnahmslos unter sich begruben. Bei diesem beispiellos komplizierten historischen Wandel blieb also kein einziger Winkel der östlichen Hälfte des Kontinents intakt. Eine ungekannte Vielfalt von Völkern und Nationen rückte in die vorderste Front des kreativen gesellschaftlichen Handelns. Die zeitgenössischen Gesellschaften traten – oftmals in enger Wechselwirkung – ihren aus heutiger Sicht historisch notwendigen Weg an. Kaum ein Vierteljahrhundert verging, bis ein völlig neuer Rechtstyp die betreffenden Gesellschaften fast zur Ganze erfasst hatte. Die Seiten- und Irrwege der seither vergangenen Zeit konnten – wenn auch unter unermesslichen Opfern – die volle Entfaltung der europäischen Formen der sozialistischen Rechtsgruppen-Region im wesentlichen nur verzögern. Insofern bestanden bereits im geschichtlichen Vorfeld der Oktoberrevolution die Vorformen der heute bekannten Komponenten der betreffenden Rechtsgruppen-Region. Nicht selten beinhaltete die Revolution des jeweiligen Volkes (bzw. der Völker) implizit die lebensfähigen Elemente eines völlig neuen Staates und Rechtstyps. Nach den Gezeiten der Revolutionen konnten sich diese lebensfähigen Bestrebungen jedoch nur vorübergehend gegen den Ansturm der Konterrevolution behaupten, die von den führenden kapitalistischen Mächten vielseitige Unterstützung erfuhr.

In den Jahren nach 1917 können wir etwa gleichzeitig drei grosse Faktoren historischer Möglichkeiten beobachten. Eine Abschwächung erfuhren diese Faktoren erst Mitte der 20er Jahre bei den Völkern mit einer erfolgreichen bürgerlichen Staats- und Rechtsrestauration. Zuallererst können wir auf die an sich schon komplex erscheinende historische Möglichkeit verweisen, welche die Revolution der Völker Russlands in sich barg, und die sogleich in den Stürmen des Umbruchs die Garantie dafür bot, dass eine Reihe europäischer Völker mit grosser Vergangenheit völlig neue Wege beschreiten würde. Mit der Stabilisierung der Sowjetmacht bewies also ein epochaler gesellschaftlicher Wandel seine Vitalität. An diesem Wandel teilzuhaben, war jedoch nur im Rahmen der Sowjetmacht oder eben in der Union Sowjet-Russlands möglich. Trotz der Garantierung der nationalen Unabhängigkeit für die europäischen Völker, die im zaristischen Russland lebten, sowie auch trotz der Lostrennung einiger dieser Völker können wir sagen, dass fast überall der Wunsch nach Schaffung der Sowjetmacht zum Durchbruch gelangte.

Selbst in Finnland, das den nordischen kapitalistischen, Rechtssystemen nahestand, erschien die Notwendigkeit der Schaffung des Rätesystems. Im Baltikum, in der Ukraine und in Belorussland traten sogleich die Möglichkeiten des Ausbaus einer sozialistischen Staats- und Rechtsordnung in Erscheinung. Insofern äusserten sich die Veränderungen, die sich in den ersten zwei Jahren der siegreichen Revolution vollzogen, bei einer Reihe von Völkern, die zuvor unter der Macht des alten Russland gelebt hatten, mit elementarer Kraft bei der Errichtung eines grundlegend neuen Staates bzw. bei der Schaffung vitaler Elemente des sozialistischen Rechts. Durch die Revolution der einst vom zaristischen Russland unterjochten Völker kamen die Veränderungen zustande, die bei einer Reihe osteuropäischer Völker die auf dem kapitalistischen Privateigentum beruhende Rechtsordnung beseitigten. So konnte die Epoche der Stabilisierung der Sowjetmacht zur Epoche der Herausbildung eines sozialistischen Staats- und Rechtstyps werden. Zugleich wurde damit eine der markantesten Komponente der europäischen sozialistischen Rechtsgruppen-Region ausgebaut.[1]

Eine bittere historische Tatsache ist jedoch, dass die restaurierten bürgerlichen Gesellschaften Mittel- und Osteuropas gegenüber den Herausforderungen der Weltwirtschaftskrise der 30er Jahre das geringste Behauptungsvermögen aufbrachten. Somit wurde auch das Schicksal der so stabil erscheinenden bürgerlich-demokratischen Ordnung durch die Heraufkunft der totalitären (faschistischen) Diktaturen unaufhaltsam besiegelt. Die Region Mittel- und Osteuropas wurde durch diesen regressiven geschichtlichen Prozess besonders betroffen. Auch die auf der Stufe des Agrarkapitalismus steckengebliebenen südosteuropäischen Staaten konnten der Faschisierungsgefahr nicht ausweichen. Nur die Kräfte, die das Zusammenwirken breitester Volksschichten (Volksfront) verkündeten, und das Bündnis der von neuem erstarkenden linken Bewegungen konnten eine ernsthafte Kraft gegen die Faschisierung bilden. Die totalitären Systeme, die der faschistischen Aggression mit unverhüllter Offenheit dienten, entstanden zumeist in den an die Sowjetunion angrenzenden Staaten. Es gab also durchgängig eine gewisse reale Grundlage dafür, dass der Staat des bestehenden Sozialismus zahlreiche Initiativen zur Schaffung antifaschistischer Bündnissysteme unternahm. Die volksfeindlichen Regime dieser Länder schlossen sich dennoch, trotz der wachsenden Gefahr, (formell) aus eigenem Entschluss dem antisowjetischen Krieg an. Indem diese Kräfte von der Aktion spektakuläre Ergebnisse erwarteten, versuchten sie, ihre untereinander erhobenen (territorialen) Revisionsbestrebungen bzw. die Beteiligung an der Aufteilung der unterjochten sowjetischen Gebiete mit den Welteroberungsplänen der Aggression zu verbinden. Für die Verzögerung des kollektiven antifaschistischen Auftretens mussten diese Staaten deshalb fast mit der Beseitigung ihrer selbständigen Staatlichkeit bezahlen.[2]

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[1] Siehe hierzu die Untersuchung des Autors über die Resultanten des bestehenden sozialistischen Rechts. A szocialista jog fejlődése. Bp. 1984. 68-72, 111-118. pp.

[2] S.o. unter Titel „Rolle der staatsgeschichtlichen Spezifika" (államtörténeti sajátosságok szerepe).

Angesichts der Neubelebung aggressiver internationaler Bestrebungen, die eine Neuaufteilung der Welt forderten, trat der Sowjetische Staat in den Jahren vor dem zweiten Weltkrieg für internationale Beziehungen ein, die den Weltfrieden von vornherein wirksamer garantierten. Diese Bestrebungen waren von dem Ziel geleitet, der Aggression vorzubeugen und die Grundlagen der kollektiven internationalen Sicherheit zu schaffen. Dies wurde auch durch das Bestreben demonstriert, die konstruktive internationale Zusammenarbeit auf eine Reihe von Ländern auszudehnen, die in früherer Zeit antisowjetische Vorhaben unterstützt hatten.[3] Die Aussenpolitik, die die gesellschaftlich-ökonomischen Errungenschaften des Sozialismus verteidigte, suchte also offenkundig die Zusammenarbeit mit den progressiven Kräften der Welt und schreckte im Angesicht der zu erwartenden faschistischen Aggression auch nicht davor zurück, Verpflichtungen einzugehen.[4] Die führenden kapitalistischen Mächte wichen jedoch der Verpflichtung zum kollektiven antifaschistischen Auftreten aus.[5]

Allgemein bekannt ist schliesslich, dass das faschistische Deutschland die Republik Polen ohne Kriegserklärung überfiel (1. September 1939), womit ein weiterer Weltkrieg begann. Die alliierten Westmächte (Grossbritannien und Frankreich) erklärten unterdessen lediglich ihren Kriegseintritt, unternahmen aber keine praktischen Schritte im Interesse des Opfers der Aggression. In dieser besonderen Situation „wurde es notwendig", dass die Rote Armee die im Rigaer Frieden (1921) Polen angegliederten „westukrainischen und westbelorussischen Gebiete unter militärischen Schutz nahm". Mit den baltischen Ländern wurden Sicherheitsabkommen abgeschlossen. Aus dieser Ausgangslage ergab sich, im Zuge eines beschleunigten geschichtlichen Prozesses, „die Wiedergeburt der westlichen Sowjetrepubliken".

Die letzteren Staaten waren bekanntlich in einer früheren ungünstigen internationalen Situation zu Schauplätzen der Restauration der bürgerlichen Ordnung geworden. Die westukrainischen und westbelorussischen Gebiete hingegen wurden im Rahmen eines Kompromisses, der durch die sowjetfeindliche Intervention Pilsudski-Polens erzwungen worden war, von den Sowjetrepubliken abgetrennt.[6]

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[3] z.B. in Richtung auf die baltischen und die Kleinentene-Staaten.

[4] Siehe die zitierten sowjetisch-französischen und sowjetisch-tschechoslowakischen Abkommen über gegenseitigen Beistand (1935).

[5] Siehe zur Zeit des Anschlusses (1938) bzw. des Überfalls auf die Tschechoslowakische Republik (1939).

[6] Ähnlich wurden die moldauischen Gebiete im Rahmen der Versailler-Washingtoner Friedensregelung dem bourgeoisen rumänischen Königreich angegliedert.

Allein die Skizzierung der äusseren und inneren Faktoren lässt leicht verstehen, dass die mit einer ununterbrochenen inneren Krise kämpfenden volksfeindlichen Systeme bald den Boden unter den Füssen verloren. Hauptsächlich nach dem Zusammenbruch der Republik Polen wurde z.B. die Lage der Baltenstaaten aussichtslos. Die Verteidigungsabkommen mit der Sowjetunion hinderten aber vorübergehend noch die weitere (Ost-) Ausdehnung des faschistischen Deutschland. „Die erstarkenden Massenbewegungen" sahen jedoch in der Wiederherstellung der Volksmacht eine gewisse Sicherheit gegen die weitere Ausdehnung der Volksmacht. So zuerst erklärten die westukrainischen bzw. westbelorussischen Voksvertretungsorgane ihren Anschluss an die Ukrainische bzw. Belorussische Sowjetrepublik.[7] Nach der Abwehr des Angriffs Finnlands, das auf aktives deutsches Betreiben hin in den Krieg geraten war, erhielt Karelien den Status einer Autonomen Unionsrepublik (März 1940). Das aus der Macht des königlichen Rumänien befreite Moldawien bat, als selbständige Sowjetrepublik in die Union aufgenommen zu werden (Aug. 1940).

All diese Veränderungen wirkten natürlich direkt und indirekt auf eine Linksentwicklung der Massenbewegungen der Baltenländer. Dies führte schliesslich zum unblutigen Zerfall der bürgerlichen Ordnung in diesen Ländern. Als erste wurde die Litauische Sowjetrepublik proklamiert,[8] dann folgte die Gründung der Lettischen und Estnischen Sowjetrepublik. Bis Ende Oktober (1940) wurden die Verfassungen der neuen Sowjetrepubliken herausgegeben. Diese Entwicklungen wurden offenkundig durch die wachsende äussere Gefahr beschleunigt. Ohnehin blieb kaum Zeit, die Institutionen der Volksmacht von unten zu organisieren. Der Ausbau der neuen Organe der Staatsmacht und der Verwaltung war noch im Gange, als die gesamte Region der neuen europäischen Sowjetrepubliken zum Kriegsgebiet wurde. Die umfassende Legislativierung des sozialistischen Rechts konnte erst nach dem zerstörerischen Krieg erfolgen. In dieser europäischen Region konnten somit erst nach dem Grossen Vaterländischen Krieg [9] „die gesellschaftlich-ökonomischen Grundlagen des Sozialismus" gelegt werden.

Dennoch konnten auch in dieser kontinentalen Region die grundlegenden Institutionen der Sowjetmacht nicht mehr beseitigt werden. Unter Leitung des Staatlichen Verteidigungskomitees wurden sie zu Objekten für die Durchführung von Sonderaufgaben. Der Wirkungsbereich der exekutiven Machtorgane

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[7] Was auch in den vom Obersten Sowjet der Union verabschiedeten Gesetzen (Nov. 1939) fixiert wurde. Siehe Istorija Sowetskoi Konstitucii 1917-1956. Red. S. S. Studenikina. Moskau, 1957. 809-810 pp.

[8] Aufgrund der Entscheidung des Litauischen Sejm, siehe ebenda (1957) 813-814 pp. Vergleiche: Obrasowanie i raswitie Sojusa Sowjetskich Sozialistitscheskich Respublik (w dokumentach) Red. A. P. Kosyzin, Moskau, 1973. 491-497 pp.

[9] Bzw. parallel zu den schweren Jahren des Wiederaufbaus.

der Republiken erweiterte sich in der Praxis. Der Oberste Sowjet der Union ergänzte dies, indem er den zum Kriegsschauplatz gewordenen Unionsrepubliken das Recht zur Aufstellung selbständiger Militäreinheiten (1944), sowie zur Errichtung von selbständigen Aussenvertretungen gewährte. Das letztere Recht wurde den (europäischen) Sowjetrepubliken erteilt, die die schwersten Kriegslasten zu tragen hatten. Infolgedessen wurden die Ukrainische und die Belorussische Sowjetrepublik zu Gründungsmitglieder der UNO.[10]

Besonderheiten der Entstehung der sog. „volksdemokratischen" Staaten

Als wir die Ursprünge des europäischen volksdemokratischen bzw. sozialistischen Rechts suchten, griffen wir nicht zufällig auf die revolutionäre Epoche von 1917-1919 zurück. Dieses tun wir auch bei der Suche nach den staatsgeschichtlichen Besonderheiten, doch lenken wir die Aufmerksamkeit nicht mehr so sehr auf die grossen historischen Möglichkeiten des Übergangs, sondern indem wir die Derivate der verhältnismässig frühen Krise der betreffenden kapitalistischen Rechtsgruppenregion betrachten, suchen wir die grundlegendsten Merkmale der Unterregionen der sich später entfaltenden europäischen sozialistischen Rechtsgruppe. Statt der historischen Vorbilder verfolgen wir also die Folgen der akuten Krise der verfallenden bürgerlichen Rechtsgruppenregion.

Über eine verhältnismässig entwickelte Produktionsorganisation und ein institutionelles System, das die höchste Stufe des modernen Kapitalismus verkörperte, verfügten in dieser Region das sogenannte zweite deutsche Reich und die Nachfolgestaaten der österreichisch-ungarischen Monarchie. Doch befanden sich Gebiete des früheren Preussen-Deutschland oder Polens oder anderer aus der Habsburger Monarchie hervorgegangener (selbständig gewordener) Staaten bei weitem nicht auf gleichem Niveau. Im Gebiet der *Weimarer Republik*, der *Österreichischen*, der *Tschechoslowakischen* und der *Polnischen Republik bildete sich der Schwerpunkt der Region heraus*, doch gilt dies primär für die westlichen Gebiete der Region. Die auffälligen inneren Disproportionen erschienen insbesondere beim Vergleich der westlichen und östlichen Gebiete der Tschechoslowakischen Republik[11] sowie der deutschen und polnischen Gebiete. Natürlich bestanden auch auffällige Entwicklungsunterschiede zwi-

[10] Später (1956-1957) wurde dieser Fortschritt von der Regierung bei der Vornahme sog. Korrekturen als Ausgangspunkt dafür betrachtet, die Gesetzgebungs- und exekutiven Machtbefugnisse der in der Union vereinigten Sowjetrepubliken weiter auszudehnen. A szocialista jog fejlődése (1984) 317-319 pp.

[11] Gegenüber dem verhältnismässig hohen Entwicklungsstand von Böhmen und Mähren war die slowakische Region auffallend rückständig. Das angegliderte Gebiet der Karpatho-Ukraine blieb noch unter diesem Niveau.

schen den Gebieten der Polnischen Republik, die früher unter preussisch-deutscher, österreichischer oder russischer Herrschaft gestanden hatten. Aber selbst für das letztere, das vormals zum Russischen Reich gehörige Gebiet war nicht mehr das Entwicklungsniveau des Agrarkapitalismus charakteristisch. Somit wirkte auch die relative Entwickeltheit der ererbten gesellschaftlich-ökonomischen Bedingungen dahingehend, dass jene Staaten, die die Nachfolge der Länder mit verspäteter bürgerlicher Umgestaltung angetreten hatten, zu Staatsverhältnissen einer modernen bürgerlichen Republik übergehen konnten. Insofern konnten sich in der Zeit zwischen den Weltkriegen die lebensfähigen Elemente bürgerlich-demokratischer Systeme nur in dieser Region herausbilden.

Entstehen der sog. „volksdemokratischen Rechtsgruppenregion" in Europa

Bei der Prüfung der Staatsstruktur der sozialistischen Länder in Europa traten auch die Kennzeichen einer inneren Gliederung der gegebenen Rechtsgruppe zutage. So ist es z.B. offensichtlich, dass von vornherein gewisse Niveauunterschiede zwischen den mit einem relativ entwickelten sozialökonomischen Hintergrund beginnenden sozialistischen Ländern in Mittel- und Osteuropa und den am Anfang noch auf der Stufe des Agrarkapitalismus stehenden Staaten entstehen konnten. Die grössere Wirkung auf die Enwicklung der Staatsstrukturen hatten trotzdem die konkreten historischen Modalitäten (die Art und Weise) des Überganges zur neuen Gesellschaftsordnung oder auch die sich aus der ethnischen Zusammensetzung des betreffenden Landes ergebenden besonderen Anforderungen. Letztere Faktoren bargen auch bedeutende zeitliche Unterschiede in sich, doch im grossen und ganzen waren wir doch Zeugen eines fast eines halben Jahrhundert andauernden, seinen Merkmalen nach in allen Ländern gleichen entwicklungsgeschichtlichen Trends in der Entfaltung der europäischen sozialistischen bzw. „volksdemokratischen" Staatssysteme. Selbst die durch äussere Faktoren verursachten Umwege (Zwangsbahnen) traten in nahezu gleicher Weise in Erscheinung, und auch die Berichtigungen der erkannten Fehler im Staatenaufbau begünstigten die Weiterentwicklung der gemeinsamen Merkmale.

Es soll also nicht nur dem besseren Verständnis dienen, wenn wir auch die in der neuesten Zeit erfolgte Rechtsentwicklung der Gesellschaften in den nahen bzw. Nachbarländern einer methodischen vergleichenden Untersuchung unterziehen. Die konkreten geschichtlichen Prozesse erlangen nämlich dadurch besondere Aktualität, dass die Wirkungen innerhalb der gegebenen Rechtsgruppe in grösserem Masse als je zuvor Wechselwirkungen sind. Dies ist ein charakteristisches Merkmal des östlichen Teils Europas in der neuzeitlichen Geschichte, die Wechselwirkung zwischen den sozialistischen Rechtsgruppenregionen in

Europa ist jedoch mehr als ein geschichtlicher Erscheinungskomplex, denn wir können mit Recht sagen, dass die darin zur Geltung kommenden Prozesse in einigen Fällen noch nicht abgelaufen sind. Wer könnte es z.B. bestreiten, dass die „Geschichtswissenschaft – wenn überhaupt, dann – gerade durch Aufdeckung der jüngsten Vergangenheit der Gegenwart eine unmittelbare Lehre geben kann".[12] Diese Wechselwirkungen sind nämlich in der jüngsten Geschichte der Völker Osteuropas im wahren Sinn des Wortes von „gegenwartsgeschichtlichem" Charakter, d.h. sie sind Träger von oft heute noch lebenden kreativen Prozessen in der Entwicklung der ost-mittel-europäischen Rechtsgruppen.[13]

Jahrhunderte unserer neuzeitlichen Geschichte (Rechtsentwicklung) verstrichen so, dass unsere Vorfahren nur vom Einfluss der am weitesten entwickelten (westlichen) Gesellschaften einen Fortschritt im Leben der ins Prokrustesbett der bekannten Vielvölkerreiche erwarten konnten. Die jüngste Geschichte Osteuropas hat jedoch diese Einseitigkeit endgültig bewältigt und den Wechselwirkungen Vorrang gegeben. Wie wir auch bei der staatsgeschichtlichen Behandlung der Region sehen konnten, traten diese Wechselwirkungen sehr vielschichtig in Erscheinung[14] und wurden oft zu nahezu determinanten Faktoren in der Entwicklung der gegebenen Staatsstrukturen bzw. Institutionssysteme. Mutatis mutandis gilt das noch mehr für die Entwicklung der ost-mittel-europäischen Formen des Rechtstyps, denn die Entwicklungsgeschichte der in den Staatsmacht war immer eng mit der juristisch geregelten Ordnung der staatlichen Tätigkeit, d.h. vor allem mit der konstitutionellen (staatsrechtlichen) Rechtsschöpfung verbunden, die die Quelle unserer zuvor erwähnten staatsgeschichtlichen Untersuchungen bildete. Es ist offensichtlich kein Beweis dafür erforderlich, dass das ost-mittel-europäische Recht in diesem Rechtszweig im letzten Vierteljahrhundert einen Rückstand von Jahrhunderten aufholte und sich so entwickelte, auch in rechtsdogmatischer Hinsicht so auffällig gut fundierte Verfassungssysteme erarbeitete, die oft auch in den erfolgreich geführten nationalen Unabhängigkeitskämpfen ferner Kontinente als Modell dienten.

Der bekannte bürgerliche Neukonstitutionalismus geriet also nach dem Zweiten Weltkrieg endgültig ins Hintertreffen, und in mehreren Bereichen der garantierten (und realisierten) staatsbürgerlichen Rechte konnte die konstitutionelle Legislation der sozialistischen Länder in Europa ausdrücklich ein Beispiel sta-

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[12] In: A szocialista jog fejlödése, Budapest 1984, 400-401 pp.

[13] Siehe vom Verfasser: S. die treffende Feststellung bei Pach, Zs. P.: Új történelmünk, új történetírásunk (Neue Geschichte, neue Geschichtsschreibung) In: Történetszemlélet és történettudomány, Budapest 1977, 551-552 pp.

[14] Dass „... solche Einflüsse in (nahezu) jeder Richtung zur Geltung kamen und jede Nation diese Einflüsse annahm, dabei jedoch aber auch auf andere Einfluss nahm". Unter Hinweis auf die direkte Vorgeschichte s. Niederhauser, E.: A nemzeti megújhodási mozgalmak Kelet-Európában (Nationale Erneuerungsbewegungen in Ost-Europa) 100. cit. (1973) 374 p.

tuieren.[15] Es besteht natürlich kein Zweifel, dass dieser auffällige staatsrechtliche Fortschritt die gesellschaftlichen Erfahrungen in sich trug, in vielen Bereichen wurde jedoch Originales geschaffen. In den letzten Jahrzehnten spielte sich jedoch eine ganze Reihe ähnlicher geschichtlicher Prozesse in den traditionellen Rechtszweigen und überhaupt im radikalen Rollenwechsel des Rechts ab.

Die Entwicklung unserer relevanten Rechtsverhältnisse prüfend, müssen wir vor allem auf den heteromorphen Zustand Osteuropas vor dem Entstehen der neuen gesellschaftlichen Formation verweisen. Als Ganzes gesehen, ist dieser Raum ohnehin schon als Region des verzögerten (verspäteten) kapitalistischen Rechts bekannt, in der Zeit zwischen den beiden Weltkriegen wurden jedoch die Niveauunterschiede noch grösser. So wurde es für den Übergang kennzeichnend, dass es aus der akuten Krise der veschiedenen bürgerlichen Rechtssysteme schliesslich keinen Ausweg mehr gab, und diese besondere geschichtliche Situation brach früher oder später ausnahmslos überall an die Oberfläche. Von diesem Umstand ist es übrigens abzuleiten, dass die antifaschistische, volksbefreiende Bewegung im Osten des Kontinents von vornherein einer geschichtlichen Situation gegenüberstand, die auch die Lebensfähigkeit der bestehenden Rechtsordnung in Frage stellen musste. Ja, je kraftvoller (und erfolgreicher) also die innere antifaschistische Volksbewegung war, desto schneller näherte sich das gegebene Land der Schaffung der Grundlagen für das sog. „volksdemokratische Recht". So wurde es zu einer Besonderheit des Übergangs, dass die relativ schwächsten Kettenglieder der Region die Schaffung der neuen gesellschaftlichen Formation (bzw. des neuen Rechts) initiierten und ihre ersten Ergebnisse den Veränderungen in Mitteleuropa weit zuvorkamen. Dabei spielt natürlich auch die Tatsache mit, dass z.B. die betroffenen Gesellschaften einst zumeist auf dem Niveau des Agrarkapitalismus in der Entwicklung steckenblieben und eine Bindung an die traditionellen Elemente der kapitalistischen Rechtsordnung in Wirklichkeit gar nicht erst entstehen konnte. Die mit einem relativ weiter entwickelten sozialökonomischen Hintergrund startenden sozialistischen Länder in Europa erbten dagegen von den verschiedenen faschistischen bzw. faschistoiden Systemen eine völlig oder fast völlig verfallene bürgerliche Rechtsordnung. Insgesamt gesehen trat also im östlichen Teil des Kontinents – zwar unter unterschiedlichem Vorzeichen – allgemein (und dauerhaft) die Unhaltbarkeit der vielfach deformierten bürgerlichen Rechtsordnung in Erscheinung. Bevor also die volksfeindlichen Systeme unter den Schlägen der Roten Armee der Reihe nach zusammenbrachen, erschöpften sich auch die Zwangsbahnen (die Umleitungen), und die betroffenen kleinnationalen kapitalistischen Rechtssysteme fielen hilflos auseinander.

[15] S. Horváth, P.: A szocialista jog fejlődése (1984) 414-419 pp. Vergl. Kudrjawzew, B. N.: Konstituzija obschenarodnogo gossudarstwa, in: Sowjetskoje Gossudarstwo i Prawo 1977, Heft 11, 10-19 pp.

Diese besondere geschichtliche Situation ist im allgemeinen im Zusammenhang mit dem Endergebnis des Zweiten Weltkrieges bekannt. Die historisch notwendige Umwälzung wies jedoch noch eine frühere Komponente auf, die wir heute leicht ausser acht lassen. Die akute Krise der bürgerlichen Rechtsordnung trat nämlich zuerst bei den Baltenvölkern in Erscheinung. Der Begründung der volksdemokratischen Rechtsordnung in den neugeschaffenen baltischen Sowjetrepubliken konnte nur der Krieg gegen die Sowjetunion vorübergehend Einhalt gebieten. So spielte sich in der Rechtsordnung der Baltenrepubliken schon die Beschränkung der zur Ausbeutung geeigneten (kapitalistischen bzw. feudalen) Besitzverhältnisse ab (Verstaatlichung, Aufteilung des Grossgrundbesitzes usw.), als in den zum Schauplatz des Grossen Vaterländischen Krieges werdenden Gebieten jede der Entwicklung des Rechts dienende Tätigkeit vorübergehend in den Hintergrund gedrängt wurde.

Wir müssen also nicht die historischen Besonderheiten des Entstehens des sozialistischen Rechts in Europa antizipieren, um die regionale Gliederung der sich herausbildenden Rechtsgruppe zu sehen. Die Konturen der konkreten Subregionen würden wir jedoch vergeblich im Zuge der Leitideen der bürgerlichen Komparatistik suchen, die oft auch heute noch die Rechtsgruppenregionen der Länder mit sog. westlichen Traditionen und der Balkanländer als Derivate der lateinisch-germanischen bzw. der byzantinisch-slawischen Kulturkreise hinstellt.[16] Übrigens können wir auch durch eine konkrete Analyse der konkreten Verhältnisse das Wesen der Rechtsgruppe erkennen bzw. die grundlegendsten Merkmale der gegebenen nationalen Rechtssysteme systematisieren. Unsere diesbezüglichen Kenntnisse bieten jedoch bis heute äusserst bescheidene Möglichkeiten, da wir weder auf eine methodische rechtsgeschichtliche Erschliessung der gegebenen Rechtssysteme noch auf eine vergleichende Untersuchung der einzelnen Rechtszweige zurückgreifen können. Anhaltspunkte für die erwähnten staatsgeschichtlichen (synthetisierenden) Versuche liefern uns praktisch nur die wirtschaftsgeschichtlich-politischen bzw. die die Rechtszweige vergleichenden Untersuchungen.[17, 18] Der Weg zu einer methodischen rechtsge-

[16] S. dieses Bild z.B. bei David, R.: Die grossen Rechtssysteme der Gegenwart (1977), 140-141 pp.

[17] S. z.B. Uspenskij, A. A.: Ekonomitscheskaja istorija sarybeschnych sozialistitscheskich stran Europy (Moskau, 1971), Kowatschew, D. A.: Sakonodatel'nyj prozess w evropejskich sozialistitscheskich gossudarstwach (Moskau, 1966) und die mit den Namen Iván T. Berend und György Ránki verknüpften ungarischen Forschungen. Vergl.: Kalbe, E.: Die eine neue Form des Übergangs zum Sozialismus, in: Zeitschrift für Geschichtswissenschaft, Jahrgang 1982, Heft 10-11, 899-909 pp., Bajtin, M. J.: Raswitie prawa w evropejskich narodnodemokratitscheskich gossudarstwach, in: Sowjetskoje Gossudarstwo i Prawo, Jahrgang 1956, Heft 1, 28-38 pp.

[18] Als Beispiele für letztere Bestrebungen s. Ciskovska, V.: Vlastnicka soustava europskych socialistickych statu (Prag, 1975), Semejnoje prawo sarubeschnych evropejskich socialistitscheskich stran. Sbornik, st. is. bolg. weng, etc. (Moskau, 1979), Eminescu-Popescu, T.: Les codes civils des pays socialistes. Étude comparative (Bukarest-Paris, 1980), Andrejew, J.:

schichtlichen (vergleichenden) Analyse unseres Themenkreises führt also auch heute nur über die Systematisierung des relevanten Tatsachenmaterials der Rechtsentwicklung.[19] Die Untersuchung der grundlegendsten Anhaltspunkte der jüngsten Rechtsentwicklung der benachbarten zeitgenössischen Gesellschaften bzw. aufgrund dieser Anhaltspunkte die Untersuchung der Hauptkomponenten des sozialistischen Rechts in Europa bleibt einer nahen oder auch möglicherweise etwas ferneren Zukunft vorbehalten.

RESÜMEE

Herausbildung der sog. „volksdemokratischen" Rechtsgruppenregion in Ost-Mittel-Europa

PÁL HORVÁTH

Die Studie untersucht die historischen Vorereignisse der europäischen sog. volksdemokratischen Umgestaltungen. Aus diesen konkreten historischen Vorereignissen wird es nämlich sichtbar, dass die bourgeoise Rechtsordnung in Osteuropa schon nach den Revolutionen 1918-1919 in eine kritische Lage geriet. An der Schwelle des Zweiten Weltkrieges wiederum erschien auch eine Reihe neuer sowjetischer Republiken (baltische, moldauische). Im weiteren lenkt der Verfasser die Aufmerksamkeit auf die Entstehung der einzelnen volksdemokratischen Staaten und erörtert die Gründe der Entstehung der wichtigsten Rechtsgruppenregionen.

Otscherki po ugolownomu prawu sozialistitscheskich gossudarstw (Moskau, 1978), Ugolownyj, prozess sarubeschnych sozialistitscheskich gossudarstw (Red. Tschugonow, Moskau, 1967), Kleinman, A. F.: Graschdanskoje prozessual'noje prawo w evropejskich norodno demokratitscheskich stran (Moskau, 1960), In der ungarischen Rechtsliteratur s. z.B. Trócsányi, L.: A munkajogviszonyok alapkérdései az európai szocialista országok jogában (Grundfragen der Arbeitsrechtsverhältnisse im Recht der sozialistischen Länder Europas) (Dissertation, 1979).

[19] Wie der Historiker sagt, „ist eine solche Untersuchung erst dann vorstellbar, wenn wir in jedem Land schon über eine einigermassen sichere Basis verfügen". S. Niederhauser, E.: A nemzeti megújhodási mozgalmak (Die nationalen Erneuerungsbewegungen) 1977, 375 p.

SUMMARY

The Evolution of European so-called People's Democratic Regions of Legal Systems in Eastern and Central Europe

PÁL HORVÁTH

The study analyses the historic precedents of so-called people's democratic changes in Europe. These specific historic precedents make it evident, that the bourgeois law and order in Eastern Europe had already got into a critical situation after the revolutions in 1918-1919. On the threshold of the Second World War new soviet republics appeared (Baltic, Moldavian). The author focuses afterwards on the evolution of the people's democratic states and discusses the reasons for the evolution of the most important regions of legal systems.

MODERNISIERUNG UND RECHTSKONTINUITÄT IN DER GESCHICHTE UNGARNS (BESONDERHEITEN UNSERER REGION)

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1. Randnationen

István Bibó, einer der wirkungsreichsten politischen Denker des 20. Jahrhunderts nannte die Tendenz, die sich in dieser historischen Region seit Ende des Mittelalters entwickelte, die Sackgasse der osteuropäischen gesellschaftlichen Entwicklung. Diese Welt besteht aus dem wie eine Kaste geschlossenen Adel der Grundherren, aus den steif uniformierten, der grundherrschaftlichen Willkür einseitig ausgelieferten osteuropäischen Leibeigenen, aus dem parallel dazu auf einen engen Kreis beschränkten, nicht zum politischen Selbstbewusstsein erwachten Bürgertum, und der Intelligenz, die sich der Macht gegenüber als Diener verhält. Bibó war der Ansicht, dass die mitteleuropäische Gesellschaft (so auch die ungarische) ganz bis zum 16. Jahrhundert zwar mit einer einfacheren Textur und einem provinzialischen Charakter, jedoch den Weg der westlichen Entwicklung ging. Für diese einfachere Textur und den provinzialischen Charakter waren hastig zurecht gekleisterte, zum organischen Zusammenwachsen ungeeignete und wenig belastbare gesellschaftliche Strukturen kennzeichnend, in denen die Struktur wegen der versteckten Disproportionalitäten, Ungleichgewichtigkeiten und latente Mängel instabil und leicht verletzlich war. Die spektakulären Elemente der westlichen Entwicklung in Ungarn waren auch nichts anderes als forcierte und anstrengende Anpassungsversuche der ostmitteleuropäischen Gesellschaft, ihre Verspätung einzuholen; Versuche der Peripherie, sich dem Zentrum anzugleichen. Das wichtigste Fachwort dieser Region in historischer und gesellschaftlicher Hinsicht ist die „Verspätung".[1]

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[1] Vgl. Bibó, István: A Kelet-európai kisállamok nyomorúsága,(Das Elend der Ost-europäischen Staaten) In: Válogatott tanulmányok (Ausgwählte Studien), Budapest 1986, Verlag Magvető, Band II., S. 185.

2. Faktoren der Verspätung

Betrachtet man die Chronologie der ostmitteleuropäischen gesellschaftlichen Entwicklung, fällt einem sofort die ein halbes Jahrtausend umfassende zeitliche Verschiebung zwischen der Entstehung der ungarischen, tschechischen und polnischen Staatsgebilden und der der westeuropäischen, als Muster geltenden Staatsgebilden, in die Augen. Das Burgunderreich mit Sitz in Worms wurde 413, und das Westgotenreich in Aquitanien 418 ins Leben gerufen. Wir können aber auch den fränkischen Staat von Chlodwig nehmen, für dessen Geburtszeit 486, das Jahr der Schlacht bei Soissons anzusehen ist. Als Anfangsdatum eines ungarischen Staates kann beim besten Willen erst das Jahr 972, als Geisa den Thron bestiegen hat, angesehen werden, aber eher die Erhebung von István (Stephan) zum Fürsten oder seine Krönung als König. Die Geschichte des tschechischen Fürstentums beginnt gegen Anfang des 10. Jahrhunderts mit dem Sieg der Přemysl-Dynastie in den Stammesgefechten über den Slawniks (995), und vielleicht kann hier auch das kurzlebige mährische Staatsgebilde erwähnt werden. Bei den Polen kann von einer selbständigen Entwicklung ab dem Zeitpunkt gesprochen werden, als Mieszko ca. 960 an die Macht gekommen ist bzw. ab der Christianisierung 966.

Dank dem zeitlichen Unterschied, diesen fünf Jahrhunderten zwischen den Staatsgründungen, weiß der Feudalismus, der den Ungarn und den Westslawen begegnet, schon ein halbes Jahrtausend Staatsgeschichte hinter sich, als die Árpáden ihre Versuche zum Aufbau eines Staates unternahmen. Diese fünfhundert Jahre ließen natürlich im Hintergrund des westlichen Staates eine entwickelte ständisch-feudalistische Gesellschaft heranreifen. Angesichts lediglich dieser paar hundert Jahre ist der Rückstand auch ohne Kommentar augenfällig.

Die Unterschiede werden dadurch nur größer, dass die westlich von unserer Region bestehenden Staaten organisch gewachsen sind. Die Strukturelemente der dortigen Gesellschaft *„bauten sich etwa in einem halben Jahrtausend organisch auf einander auf, in einem mehrphasigen, zeitlich tief gegliederten Entwicklungsgebilde"*[2]. Die Gesellschaften des Westens entwickelten sich *„ohne Vorbild"* (höchstens mit Wurzeln und einer Vorgeschichte). Sie konnten nur „ihren eigenen Weg" gehen, die definierbaren Institutionen der Gesellschaft entstanden in allen Sphären der Gesellschaft proportional, ohne Zwang und ohne Anstrengungen. Deshalb wurden dort bei der Gestaltung der gesellschaftlichen Ausrichtung keine Ersatzmittel (zum Beispiel Politik oder Recht) in Anspruch genommen. Die mitteleuropäische Region (darunter verstehen wir im Folgenden die Staaten östlich der Elbe bis zu den äußeren Zügen der Kar-

[2] Szűcs, Jenő: Vázlat Európa három történeti régiójáról (Ein Grundriss über drei geschichtliche Regionen Europas), Budapest 1983, Verlag Magvető, S. 60.

paten) und darin die ungarische Entwicklung jedoch, da sie sich dem „westlichen Modell" als Peripherie (Randgebiet)[3] anschlossen, bildeten die Werte des westlichen Modells nach oder adoptierten sie: dies führte weit weg von einem organischen Wachstum. Natürlich geht es hierbei nicht um eine Imitation, nicht um eine knechtische Nachahmung, denn die inhaltlichen Voraussetzungen der westslawischen und der ungarischen Staatsgründung (Zerfall der Stammesgemeinschaften, Entstehung von Gefolgschaften, gesellschaftliche Differenzierung) standen schon bereit oder sie waren im Entstehen begriffen, und der Staatsgründungstätigkeit standen keine besonderen Hindernisse entgegen. Welche konkreten Formen diese Staatsgründungstätigkeit annahm, im Geiste welcher Ideologie und Politik, in Allianz mit welchen anderen Staaten dieser Machtapparat geschaffen wurde, dazu war der herkömmliche „Stammesstaat" als Anfang nur ein schwaches Haargefäß.[4]

Und warum suchte man schnell nach einem Modell, anstatt die ruhige, natürliche, innere Entwicklung abzuwarten? Die Ursachen dafür waren vor allem außerpolitischen Charakters.[5] Das dargestellte „Heranreifen" der westeuropäischen Staaten in 5-6 Jahrhunderten verlief verhältnismäßig unter friedlichen Umständen. In dem Sinne wenigstens, dass die von ihnen östlich angesiedelten Völker wie Wellenbrecher die immer wieder erneut einsetzenden Wellen der Völkerwanderung abwehrten, und dass es in Europa keine auswärtigen Mächte gab, welche die anfänglichen feudalistischen Staaten und Gesellschaften beeinflusst hätten. Man könnte auch sagen, dass der Ausbau des Feudalismus eine „innere Angelegenheit" war. Nicht aber im Fall der Tschechen, Polen und Ungarn. Bis zur Zeit ihrer Staatsgründung haben sich die Verhältnisse in Europa erheblich geändert. Als Antwort auf die Provokation der ungarischen Einfälle in Westeuropa entstand 967 das Heilige Römische Reich Deutscher Nation, das sich mit einer unverhehlten Expansionspolitik gegen Osten wandte. An den südlichen Grenzen Ungarns wurde Byzanz immer kräftiger, und 971 machte es den bulgarischen Staat – ein abschreckendes Zeichen für Ungarn – zu seiner Provinz. Es war ein offenes Geheimnis, dass die Deutschen das tschechische Fürstentum einverleiben wollten, und auch die Polen hatten mit den Expansionsvorstellungen des deutschen Kaisertums zu rechnen. Die osteuropäischen Fürstendynastien wurden also zu Dirigenten einer gesellschaftlichen Entwicklung, die in Zwangsbahnen verlief.

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[3] Kosáry, Domokos: Az európai fejlődési modell és Magyarország. (Das europäische Entwicklungsmodell und Ungarn) In: A történelem veszedelmei (Die Gefahr der Geschichte), Budapest 1987, Verlag Magvető, S. 11.

[4] Vgl. Szűcs, Jenő – Hanák, Péter: Európa régiói a történelemben (Regionen Europas in der Geschichte) Budapest 1986, Akademie für Wissenschaften , S. 7.

[5] Kosáry, Domokos: Magyarország Európa újabbkori politikai rendszerében (Ungarn in dem neuzeitlichen politischen System Europas), Budapest 2001, Verlag Osiris, S. 132-134.

Die Frage bestand darin, ob diese Völker sich mit Erfolg in den angebotenen fertigen Rahmen des westlichen gesellschaftlichen Modells einfügen oder von der europäischen Landkarte des Mittelalters als selbständige staatsbildende Gesellschaften verschwinden. Diese unglaublich schnellen Aktionen der Anpassung erfolgten in kaum ein paar Jahrzehnten. Wenn wir in unserem Fall zum Beispiel annehmen, dass die spektakuläre Niederlage der ungarischen Heere bei Merseburg oder Augsburg der Zeitpunkt war, wo die ungarischen Stammesfürsten die Notwendigkeit der Anpassung erkannten, umfasst die genannte Zeitspanne höchstens sieben Jahrzehnte; datieren wir aber den Anfang der ungarischen Staatsbildung auf das Fürstentum von Geisa (Géza 972-997), schrumpft der zur Verfügung stehende Zeitraum auf knapp drei Jahrzehnte.

Die Aufnahme in die Gemeinschaft der christlichen Staaten war nämlich mit Bedingungen verbunden.

Unter anderen musste der gesalbte König von der Welt anerkannt werden (dies setzte eine politische Umwälzung voraus), sowie eine vollständige Kirchenorganisation musste vorhanden sein (was natürlich mit dem bedingungslosen Ausbau des Einflusses der römischen Kirche einherging). Man kann sehen, dass den Árpáden, Přemysln und den Piasten Bedingungen gestellt wurden, die nicht zukünftiges, sondern sofortiges Handeln erforderten. Gemäß den Erwartungen der Gemeinschaft westlicher Staaten sollten Institutionen nach dem westlichen Muster geschaffen werden, außerdem auch andere Institutionen, bei denen nicht unbedingt ein westliches Muster angewendet werden musste, bloß bei diesem Tempo der Umgestaltung stand kein anderes zur Verfügung.

Hier müssen die Vorgeschichte und die Wurzeln als Faktor genannt werden, deren es auf dem ungarischen und polnischen Landesgebiet völlig ermangelte, und im tschechischen Fürstentum waren sie wegen der früheren Anwesenheit der bayerischen Stämme höchstens in Spuren vorhanden. Es fehlten die nicht unerheblichen Elemente der westlichen organischen Entwicklung, die in der Wirtschaft und in der Gesellschaft des zerfallenden Römischen Reichs ablaufenden Vorgänge, welche zahlreiche Institutionen des zukünftigen europäischen Feudalismus noch vor seinem Entstehen schufen. Denken wir nur an die Latifundien und die auf ihrer Grundlage stark gewordenen Organisationen der Privatmacht, an den Ersatz der öffentlichen Gewalt, an die Kolonisten, an diejenigen, die sich unter ein Patronat zogen, und an den Gedanken, das Christentum zur Staatskirche zu machen. All diese Sachen waren in den Institutionen der feudalistischen Grundherrschaft, der Macht der Landesherren, der Leibeigenschaft, des Lehnwesens und der christlichen Ideologie versteckt. Die Brücke zwischen den Einwanderern und der bereits hier Sesshaften, zwischen den neuen feudalistischen Staatsgebilden und der zerfallenden römischen Machtstruktur bedeutete die Schicht der Aristokraten, die versuchte, sich über die

Änderungen hinweg zu retten, und die als Gegenleistung für ihre Dienste, ihre Praxis und Kenntnisse in der Staatsorganisation zahlreiche Produkte des bröckelnden Römischen Reiches dem Feudalismus „vererben" konnten. Wie wir sehen, hat die feudalistische Entwicklung nicht mit der Landnahme der barbarischen Stämme, sondern bereits in der Gebärmutter des Römischen Reichs begonnen. Die Anfänge hätte – wenn genügend Zeit dafür zur Verfügung gestanden hätte – auch die Institution der Stammesstaaten bedeuten können, die aus der Krise der auf Blutsverwandtschaft beruhenden Gesellschaft hervorgegangen ist, diese Stammesstaaten wurden aber bei der Staatsgründung durch István (Stephan), Mieszko und Boleslaw als politisch rivalisierende Machtzentren zerstört. Was der Westen aus der antiken Kultur, Politik und Wirtschaft aufgenommen hatte, erhielten die osteuropäischen Gesellschaften durchgesiebt, nach Geschmack des westlichen Feudalismus gestaltet und in einer von Rom und dem Deutschen Reich abhängenden Dosierung.

3. Folgen der Verspätung

Die Lage, die von den oben nur skizzierten Faktoren bewirkt wurde, kann hier nur in noch gröberen Zügen analysiert werden, denn zur Antwort gehören im wesentlichen alle positiven und negativen Tendenzen und Erscheinungen der Entwicklung unserer Region sogar bis heute. In der Zwangslage gab es keine Alternativen.

Für die slawischen Völker waren das Aufholen und der Kurs auf Integration die einzig mögliche Handlungsalternative.[6] Etwas grob formuliert heißt das, dass die zeitgenössische Politik fast die vollständige politisch-ideologische Struktur (Aufbau der Streitkräfte, Ordnung der Staatsorgane, aber mindestens ihr Funktionssystem, die politische Ideologie, das römische Christentum, in Verbindung damit auch die durch sie vermittelte Kultur und Schriftlichkeit, das Recht usw.), die westlich zugeschnittene Außenpolitik, sowie die nach dem westlichen Modell aufgebaute, jedoch in zahlreichen Zügen davon abweichende gesellschaftliche Gliederung importieren musste. (So entstanden zum Beispiel die Züge des Lehenwesens anfangs noch nicht. Mit der Zeit entstand natürlich dann auch in diesen Ländern das Donationssystem, eine eigentümliche Art des Lehenwesens, jedoch zu dieser Zeit schon in Verbindung mit dem Ständewesen. So lebten die beiden Institutionen, anstatt sich in gewissem Sinne abgewechselt zu haben, mit einander verschränkt, sich gegenseitig schwächend, zeitweise aber auch stärkend, fast bis zum Entstehen des bürgerlichen Staates neben einander.)

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[6] Hajnal, István: A kis nemzetek történetírásának munkaközösségéről (Über die Forschungsgemeinschaft für die Geschichtschreibung der kleinen Nationen), Budapest 1942, S. 34.

Auch in der Wirtschaft kam es sinngemäß zur Übernahme des westlichen Modells. Nicht so sehr auf die westliche Technik der Landwirtschaft war die ostmitteleuropäische Gesellschaft angewiesen (Es ist ja allgemein bekannt, dass die hier ansässigen Völker bereits früher Landwirtschaft in großen Ausmaßen betrieben.), sondern auf die Organisation der Wirtschaft, auf die Entstehung des naturalen Großgrundbesitzes, auf das Abstoßen der darauf arbeitenden Freien auf die Ebene der Entrechteten. Die Bevölkerung dieser Region befasste sich schon seit einer geraumen Zeit mit Landwirtschaft, doch gab es für sie auch in der landwirtschaftlichen Technik übernehmenswerte Sachen. Dadurch, dass die tschechische, polnische und ungarische Politik die westliche Integration wählten und ihr Land ins politisch-wirtschaftliche System der christlichen Staaten einfügten, gerieten sie in der Arbeitsteilung in eine Zwangsposition. Im Gegensatz zum Westen, der im 11. Jahrhundert schon den Weg der Warenproduktion und der Loslösung der Gewerbe ging, erlebte man im Karpatenbecken die Zeiten, wo Menschen entrechtet und in die Landwirtschaft gezwungen wurden, und die Gesellschaft in den Wehen der Zwangsregelung lag. Während im 13. Jahrhundert für die westlichen Gesellschaften die frühen kapitalistischen Formen, die Manufakturen und ein ständischer Staatsaufbau kennzeichnend sind, konnten sich die Herren der Gesellschaft in Ungarn über die Stabilisierung des feudalistischen Produktionssystems und über die Verbreitung der feudalistischen Formen in der Landwirtschaft freuen. Im 14. Jahrhundert konnten wir der westeuropäischen Industrie in erster Linie landwirtschaftliche Produkte und Rohstoffe, Mineralien, vor allem das Fördergut unserer Gold- und Silberminen gegenüberstellen. Während dort mit dem Fortschritt der Geldwirtschaft und der bürgerlichen Entwicklung ein gut funktionierender Binnenmarkt entstand, bestand hier eine auf Agrarexport aufgebaute Wirtschaft, die Industriegüter nur im engen Rahmen der Zünfte herstellte. Obwohl der befreiende Prozess in Richtung freie bäuerliche Warenproduktion auch in dieser Region einsetzte, blieb er bald stehen. Die politischen Ereignisse, wie in Ungarn das Vordringen der Türken, die Teilung des Landes in drei Teile, die Unterwerfung den Habsburgschen Interessen (auch in Folge der geographischen Entdeckungen und der Kolonisation), der Verlust und die Einengung der westlichen Märkte, weil der Westen Ostmitteleuropa den Rücken wandte, verursachten Rückschritte in der Entwicklung.

Wie der Historiker Gyula Szekfü bemerkte, hätte man in Ungarn die Bauern auch ohne den Bauernkrieg von Dózsa zu Hörigen gemacht. Die Bauernbewegung wurde nur zum Vorwand genommen, als die Dekrete zur Sanktionierung der zweiten Leibeigenschaft erlassen wurden.[7] Die Grundherren konnten die Menge der bisher eingenommenen Abgaben nur auf diese Art und Weise kon-

[7] Hóman, Bálint - Szekfü, Gyula: Magyar történet (Ungarische Geschichte), Budapest 1942, Királyi Magyar Egyetemi nyomda, Band II., S. 567.

servieren. Diese Wende in der Wirtschaft gebot der Entwicklung Halt und verursachte die Reversion der Gesellschaft, die sich in die von Bibó beschriebene Sackgasse einbog. Die politisch-rechtlichen Bestrebungen der Stände gegenüber anderen Gesellschaftsschichten und der königlichen Macht wurden immer stärker. Das – gemäß dem früheren Wortgebrauch – „verkalkte" Ständewesen war begleitet von einer erneuten Ausweitung der rechtlichen Herrschaft über den Leibeigenen, was einer Warenproduktion durch die Bauern den Weg verstellte. Es konnte kein tatsächlicher Binnenmarkt entstehen, nur beschränkte örtliche Märkte; das Gewerbetreiben hatte keinen Nachwuchs, die Entwicklung der interesselosen Hörigenarbeit stagnierte. Das Bürgertum wurde durch das erneut stärker gewordenen Ständewesen in doppeltem Sinne gewürgt. Einerseits verhinderte es die weitere Entwicklung der sich langsam entfaltenden bürgerlichen Gesellschaft, und die ständische Gesetzgebung durchlöcherte sogar die bereits erworbenen Privilegien, eines nach dem anderen. Andererseits konnte sich das Bürgertum auch zahlenmäßig kaum entwickeln, weil es keinen Nachschub aus dem Bauerntum bekam. Das ostmitteleuropäische Bürgertum, das die Schwelle zum 19. Jahrhundert übertrat, besaß kein bürgerliches Wertesystem und auch nicht das Selbstbewusstsein des Bourgeois, und dazu kam noch, dass für ihn die echte Karriere darin bestand, ein Adeliger zu werden.

Diese Verzerrungen in der gesellschaftlichen Schichtung hatten viele politische und staatspolitische Folgen, von denen die wichtigsten nachstehend dargestellt werden sollen.

Die ostmitteleuropäischen Gesellschaften gerieten in eine durch innere Spannungen beladene Situation, so dass sie nicht im Stande waren, den an ihren Grenzen mit Expansionsansprüchen erschienenen Großmächten Widerstand zu leisten. Der tschechische Staat erlebte die bürgerliche Zeit zunächst als Kurfürstentum des Römischen Reichs Deutscher Nation, später als ein an Österreich angeschlossenes Land der Habsburger. Die Geschichte Polens war immer von den Kriegen gegen die angrenzenden Großmächte begleitet: zunächst war es gezwungen, die Hoheit des deutschen Kaisers anzuerkennen, später fiel das durch den Widerstand gegen die russische, schwedische und türkische Drohung geschwächte polnische Königtum Preußen, Russland und Österreich zum Opfer, und bis zum Wiener Kongress wurde es dreimal neu aufgeteilt. Ungarn konnte während der türkischen Besatzung den Wiener Ambitionen keinen Einhalt gebieten, so trat es unter der Herrschaft der Habsburger in die Reformzeit ein.

Wegen der bereits dargestellten Entwicklung konnte in Mitteleuropa keine konsequente Zentralisierung umgesetzt werden. Die Zentralisierung bestand immer nur für eine kurze Zeit (László Lokietek I., Kasimir III. und IV., die Herrscher aus dem Hause Anjou, Matthias Hunyadi, *Přemysl Ottokar II.*, *Karl (Luxemburg) I.*, und auch die Versuche der Habsburger in Ungarn scheiterten am Widerstand der Baronen und Adeligen.

In der Landespolitik war der ständische Provinzialismus im Vormarsch, der Schutz und die Verteidigung der ständischen Privilegien wurden fast zum ausschließlichen Ziel. Diese Tendenz führte in Polen sogar zur Entstehung einer „Adelsrepublik" (*rzeczpospolita*), die an der Aufteilung des immer mehr funktionsunfähiger gewordenen polnischen Staates mitschuldig war.

Wegen der einseitigen und unproportionalen Entwicklung der Gesellschaftsschichten (*"Die Formen sind mal etwas unorganisiert bruchstückhaft oder roh, mal aber ungegliedert grob und hybrid, mal waren sie mit archaischen Zügen durchwoben, oder sie hoben sich durch ihre Größenordnungen von einander ab."*) zeigten sich in der Gesellschaft immer mehr Zeichen der Disfunktion, die Wirtschaft und die politische Sphäre wurden von größeren und kleineren Krisen erschüttert.[8]

Eine „Andersartigkeit" der ostmitteleuropäischen Entwicklung ist nicht zu leugnen. Wie wir gesehen haben, hätte eine mechanische Adaptation auch nicht Wurzeln schlagen können. Die Änderungen an den Modellen verzerrten jedoch die Modelle selbst, was dann zu einem vom ursprünglichen abweichenden Funktionieren führte, was wiederum ständig politische Eingriffe seitens der Regierung notwendig machte.

Die Störungen gingen mit erhöhter Inanspruchnahme von „Ersatzmitteln" einher. Die Politik bediente sich gerne staatlicher Mittel (wie zum Beispiel der rechtlichen Regelung), die auf das Verhalten der Menschen einwirkten, statt Lösungen anzuwenden, die eine tatsächliche Heilung der Probleme hätten herbeiführen können.[9]

Als Ergebnis all dieser Umstände waren alle Erscheinungen der Gesellschaft stark von Politik durchtränkt, sei es die Wirtschaft oder die Literatur. Die Ideologie war übergewichtig, das politische Element durchdrang viel zu stark die Welt des Bewusstseins.

Die Gesellschaft baute „von oben nach unten". Der Staat der Reformerelite, die die Ideologie der Befolgung des Musters auf ihre Fahne steckte und von einem gewissen messianischen Bewusstsein geführt war, baute die entsprechenden gesellschaftlichen Gruppen unter sich auf. Etwas vereinfacht heißt das, dass die feudalistische Gesellschaft von der Politik geschaffen wurde. Natürlich könnten hier noch zahlreiche, sich markant abzeichnende Folgen dieser eigenartigen Entwicklungsbahn aufgezählt werden, aber ich denke, zur Behandlung der Staatsmodelle, bei deren Entstehung in Ostmitteleuropa die Modernisierung eine große Rolle spielte, reicht es, nur die wichtigsten zu nennen.

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[8] Szücs: 1983, S. 60.

[9] Kulcsár, Kálmán: Reform, modernizáció, politika (Reform, Modernisation, Politik). In: Világosság 1987, Heft 10., S. 608.

4. Modernisierung

Es ist eine allgemein anerkannte Tatsache, dass Entwicklung und Rückständigkeit die zwei Seiten einer und derselben Erscheinung bezeichnen. [10] Keine der beiden kann an und für sich betrachtet und bewertet werden. Dies bedeutet im Fall der ostmitteleuropäischen Gesellschaften, dass die westliche Entwicklung für sie als Muster und Wert galt, jedoch ohne Verleugnung der eigenen Werte und Interessen.[11] Wie im Verhältnis zwischen Zentrum und Peripherie im Allgemeinen, erschien auch hier mit elementarer Kraft ein Verlangen nach dem Aufrücken. Und es wurden zahlreiche Möglichkeiten und Formen dieser „Jagd" erarbeitet, die von den im Zeichen der Modernisierung und im „Bewusstsein ihrer messianischen Sendung" politisierenden Reformern mit ununterbrochener, jedoch von Zeit zu Zeit aufflackernder Hitze angeführt wurden. Der „Zwang des Aufholens"[12] trieb und treibt auch heute noch den Mechanismus der Modernisierung mit einer Kraft, welche die Gesellschaft zu gestalten vermag. Diesem Zwang ist die sich von Zeit zu Zeit einstellende Erneuerung des tschechischen, polnischen und ungarischen Staates, sowie ihrer Politik, Bildung und ihres Rechtes zu verdanken, was mit der Illusion eines erfolgreichen und spektakulären Aufholens vertröstete. Ich denke, als solche Erneuerungen sind in Ungarn zum Beispiel selbst die Gründung des christlichen Staates, die Präzentralisierung der Anjous, die ständische Zentralisierung von Hunyadi, aber auch der ungarische Versuch des aufgeklärten Absolutismus anzusehen.[13]

In diese Reihe fügten sich in Ungarn natürlich die Bewegungen der Reformzeit ein, an deren Ende die bürgerliche Umwälzung 1848 stand. Diese war eine Änderung mit einer Tragweite, die viel größer war als alle anderen zuvor. Denn diesmal musste die ungarische politische Elite nicht nur die modernisierende Adaptation umsetzen, sondern sie hatte auch die Aufgabe, die Gesellschaft in eine bürgerliche Gesellschaft zu verwandeln.

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[10] Berend T. Iván – Ránki György: Az állam szerepe a periféria 19. századi gazdaságában (Die Rolle des Staates in der Wirtschaft der Peripherie im 19. Jh.), In: Valóság 1978, Heft 3., S. 1.

[11] Kulcsár, 1987, S. 603.

[12] Hankiss, Elemér: Kényszerpályán? Tanulmányvázlat a magyar társadalom legújabbkori fejlődéséről. (In der Zwangsbahn? Eine Studienskizze über die Entwicklung der ungarischen Gesellschaft in der neuesten Zeit) In: Medvetánc, Heft 4., 1982 / 1. 1983. S. 7-8.

[13] Kulcsár, Kálmán: A modernizáció és a jog (Modernisation und Recht), Budapest 1989, S. 14-15.

5. Die ungarische Reformzeit

Ungarn erreichte die Zeit ernsthafter Reformen in den zwanziger Jahren des 19. Jahrhunderts, nach kleineren und größeren Kämpfen mit dem Wiener Absolutismus. Es erschienen im Lande nicht einfach die europäischen revolutionären Bewegungen des Vormärz, sondern es ging um vieles mehr. Ungarn war mit seiner habsburgfeindlichen Attitüde indirekt und zugleich auch europafeindlich. Lange Jahrhunderte betrachteten die Stände die europäische Politik als Politik der Habsburger, und das ius commune als kaiserliches Recht. In Folge dessen war natürlich auch das Einsickern der Ideen eingeschränkt. Die fortschrittlichen Gedanken waren durch einige Aristokraten mit weitem Blickfeld, durch die Peregrination in den protestantischen Universitäten und durch Honoratiorenkreisen vertreten. Und als die Stände an die Erneuerung gingen (wie in der Landesversammlung von 1790/92), machten die Nachrichten über ausländische Ereignisse (Ereignisse der Französischen Revolution, die Radikalisierung und anschließend die Jakobinerdiktatur) oder die nervöse Reaktion Wiens (wie das blutige Liquidieren der Honoratiorenbewegung, der so genannten ungarischen Jakobinerbewegung) tatsächliche Reformen unmöglich.

Das 19. Jahrhundert brachte aber bedeutende Änderungen mit sich.

Die polizeilichen Auswirkungen der Regierungspolitik in den zwanziger und dreißiger Jahren wurden etwas milder. Das Reisen wurde möglich und damit auch zur Mode. Wer konnte, bereiste die Länder Europas. Einige kamen nur in die näher gelegenen deutschen Städte und Länder, andere steckten sich Frankreich oder England als Reiseziel, wieder andere kamen sogar nach Amerika. Die Heimkehrer brachten die frischen Ideen und die revolutionären Gedanken Europas mit. Die Freiheitsidee des Liberalismus und andere Ideen der Aufklärung, die früher wegen der Vormundschaft des aufgeklärten Absolutismus an den Reichsgrenzen hängen blieben, erreichten den ungarischen Boden. Die rasche Entwicklung der Presse, des Buch- und Zeitungsdruckes bot die Mittel zur Verbreitung der Ideen und der Ansichten an. In einigen Fragen der Modernisierung entfachten weite Diskussionen in der Gesellschaft. Die deutsche und österreichische Staats- und Rechtswissenschaft durchdrangen das ungarische juristische Denken mit einer immer größeren Intensität, teils durch die offiziellen universitären Kanäle, teils durch die Peregrination. In den Parlamentsdebatten war bereits natürlich, dass die Redner aus englischen, deutschen oder französischen Werken zitierten. Das Land öffnete sich endgültig gegenüber Europa. Deshalb war es nur eine Zeitfrage, wann der große Modernisierungsprozess einsetzen wird.

In der Reformzeit (zwischen 1825 und 1848) wurden sechs, einzeln sogar mehrere Jahre dauernde so genannte Reformlandesversammlungen abgehalten. Der Gegenstand war im wesentlichen die Modernisierung, die aber erst in den vierziger Jahren Fragen der Rechtsharmonisierung aufwarf. Bis dahin stand die Verbesserung der Lage des Landes auf Tagesordnung. Die Opposition machte Versuche, wie weit sie mit der Infragestellung der bestehenden rechtlichen und staatlichen Einrichtung gehen kann. Sie arbeitete mit großer Geduld an der Abtragung der Mauern des Ständewesens. Dann in den vierziger Jahren, nachdem die Punkte des geringsten Widerstandes gefunden worden waren, wurde auch die Modernisierung des Rechts in Angriff genommen, wie das bei der Schaffung des Handelsrechts ersichtlich ist.

Der Motor der Änderungen war das Komitat, wo sich der für die Reformen engagierte Adel zu organisieren begann. Im Sinne der so genannten Munizipalvertretung wurden die Gesandten der Landesversammlung von den Komitaten gewählt. Die Entscheidungen der Landesversammlung hingen (in der Untertafel wenigstens) davon ab, wie weit sich die Komitate radikalisiert haben. Die Programmpakete entstanden auch nicht auf Landesebene, sondern im Komitatsleben. Es ist also kein Zufall, dass die Umwälzung nur im Rahmen des adeligen Denkens in den Komitaten vor sich gehen konnte. Und dies legte die Rechtsnachfolge als Rahmen der Modernisierung fest.

In der Modernisierung und in der Gesetzgebung mussten also zwei Tendenzen mit einander abgestimmt werden: die Idee der Rechtsnachfolge und die Zielsetzung des Fortschritts. Die Rechtsnachfolge kam am prägnantesten in der These von József Eötvös zum Ausdruck: Nicht dem Adel müssen seine Rechte genommen werden, sondern das Volk soll auf sein Niveau erhoben werden. Das heißt, es sollte eine Lösung gefunden werden, bei der die herkömmlichen ständischen Rechte erhalten bleiben, oder so wenig wie möglich angetastet werden, während die Modernisierung des Landes erfolgt. Dieser Rahmen stellte statt der Revolution die Reformen in den Vordergrund. Die ungarischen Politiker suchten sogar noch während des Freiheitskampfes nach einem Vergleich mit Wien, um dadurch den „friedlichen" Weg der Umwälzung gegenüber dem radikalen Weg zu glätten. (Die größte Parlamentspartei wurde von den Radikalen der Zeit höhnisch „Friedens-" oder „Handelspartei" genannt.) Ein gutes Beispiel für das Festhalten an den traditionellen Werten und am Recht war es, dass die Reformer darauf bestanden, die großen Regeln der bürgerlichen Umwälzung, die so genannten Aprilgesetze, gemäß den Regeln der traditionellen ständischen Landesversammlung zu verabschieden, also nach einer Kontrolle durch die Stände und den Adel in den zwei Kammern der Landesversammlung, mit Unterstützung des Diätausschusses der Kanzlei, mit Zustimmung der Reichsorgane und mit Sanktionierung durch den Herrscher. Und dem war es auch so.

Durch zwei Beispiele der Rechtsharmonisierung wird die komplexe Auffassung der damaligen Zeit vielleicht besser verständlich. Das eine Beispiel ist aus dem Bereich der privatrechtlichen Regelung des Grundbesitzes von Adeligen, und das andere aus dem Bereich der Modernisierung der politischen Rechte der Stände.

Was die Veränderung der privatrechtlichen Verhältnisse betrifft, bezogen die Stände den Standpunkt, dass man alles berühren kann, nur die Eigentumsrechte des Adels sollen dadurch grundsätzlich nicht verletzt werden. Im Ergebnis konnte das Handelsrecht, das die Interessen des Adels nicht tangierte, gesetzlich geregelt werden. (Gründung und Betrieb von Fabriken, Handelsgesellschaften, Konkurs, Wechsel usw.) Woran aber der Adel näher interessiert war, konnte nicht angetastet werden (Familie, Eigentum, Einschränkungen des Verkehrs). Auch die traditionellen Grundsätze des Frondienstes und des Erbrechts (Leibeigenschaft, Avitizität) konnten erst als Folge der revolutionären Bewegungen aufgehoben werden. Jedoch nur prinzipiell und in einer Deklaration, ohne eine Lösung und ohne den Anspruch auf eine endgültige Regelung.

Eine der größten Änderungen im öffentlichen Recht stellte die Einbürgerung des Vertretungsrechts im bürgerlichen Sinne dar. Das Gesetz 1848:5. organisierte die Wahlen und die Landesversammlung auf der Basis der Volksvertretung. Der ausschließliche Einfluss der Stände auf die Wahl der Gesandten (von nun an: der Abgeordneten) wurde aufgehoben, aber alle durften ihr Wahlrecht behalten. Auf diese Weise hatten 8-9% der Bevölkerung das Wahlrecht, was dem damaligen europäischen Durchschnitt entsprach. Es stand jedoch größtenteils immer noch dem gebürtigen Adel zu, unabhängig davon, ob der Zensus bezüglich der nicht adeligen Bevölkerung erfüllt wurde oder nicht. Auch das in Ungarn „Landesversammlung" genannte Parlament behielt seinen früheren Aufbau. Das Zweikammersystem blieb bestehen, an der Obertafel wurden keine wesentlichen Änderungen vorgenommen, nur die Untertafel erfuhr etliche Änderungen, aber die Grundsätze des Funktionierens wurden nach den früheren ständischen Techniken modernisiert und bürgerlich zugeschnitten. Es ist für die damaligen Zustände typisch, dass im alltäglichen Wortgebrauch Obertafel und Untertafel noch lange weiterlebten, obwohl die offizielle Bezeichnung der Kammern „Abgeordnetenhaus" und „Oberhaus" war.

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In diesem Sinne erfolgte also die Modernisierung der ungarischen Gesellschaft und des Rechtssystems. Die modernen europäischen Ideen, wie Volksvertretung, parlamentarische Regierungsverantwortung, Gleichheit vor dem Gesetz, Pressefreiheit und Gleichheit der Konfessionen fanden nunmehr Eingang in das ungarische Rechtssystem. Gleichzeitig sorgten aber das politische System selbst und

das traditionelle juristische Denken dafür, dass zahlreiche Werte der Ständegesellschaft im System erhalten blieben. Die Umwälzung erfolgte nicht in der Revolution auf der Straße, sondern in politischen Verhandlungsprozessen im Parlament. Die Rechtsharmonisierung und die Erneuerung gingen, wie zuvor schon sehr oft, unter Aufsicht der Politik vor sich.

Die Rede von Lajos Kossuth, dem bekanntesten radikalen Politiker der ungarischen Revolution und des Freiheitskampfes zeigt sehr wohl, wo die Änderungen in Ungarn ihren Platz haben. Die Rede hielt er in der großen Kirche der Stadt Debrecen in dem revolutionären Moment, als die anwesenden Abgeordneten das Haus Habsburg entthronten. Der Text, der auch in die Unabhängigkeitserklärung eingebaut wurde, lautet: *„Die Gesetze von 1848 sind nach meiner starken Überzeugung keine Geschöpfe einer Revolution. Mit den Gesetzen von 1848 machte die ungarische Nation keine Revolution. Sie stellten nichts anderes dar, als die Sicherstellung der Rechte, die auf Papier, und wenn der Eid der Könige mehr wäre als geschriebene Gnade, dann im Eid der Könige und in den mit ihnen ausgehandelten Vergleichen vor Gott und der Welt immer schon unser eigen waren. In unseren Gesetzen war deklariert, dass Ungarn frei und unabhängig, und keiner anderen Nation unterworfen sei... und in der Sache änderte sich lediglich, dass die Aufrechterhaltung dieser Unabhängigkeit und Selbständigkeit gemäß Gesetz früher den Regierungsstühlen und insbesondere dem ungarischen so genannten Statthalterrat als Pflicht auferlegt war, und die Aufrechterhaltung und Sicherstellung dieser Gesetze wurde jetzt den Ministern, nicht aber einem kollegialen Rat anvertraut."*[14]

RESÜMEE

Modernisierung und Rechtskontinuität in der Geschichte Ungarns (Besonderheiten unserer Region)

BARNA MEZEY

Der Verfasser behandelt in seiner Studie die Besonderheiten der Entwicklung von Randnationen in Ostmitteleuropa. Er beschreibt die spezielle geschichtliche Situation, die westlich des Karpatenbeckens und seiner in nördlicher Richtung verlängerten Linie, also östlich von den Grenzen des ehemaligen Ostfränkischen Reiches bestand. Die Bewohner dieser Region, die Slawen und

[14] Aus der Rede von Lajos Kossuth vom 14. April. In: Horváth Mihály: Magyarország függetlenségi harcának története 1848-ban és 1849-ben. (Die Geschichte des Unabhängigkeitkriegs Ungarns im Jahre 1848 und 1849), Genf 1865, S. 500.

die Ungarn, wurden – nachdem sie zunächst in den 10-11. Jahrhunderten in Stammesverbänden lebten und dann beschlossen, sich der Gemeinschaft christlicher europäischer Staaten anzuschließen – durch ihre nach westlichem Muster (zunächst westfränkisch, dann französisch, deutsch) aufgebauten Staatsgebilden zu Teilen der europäischen Entwicklung. Dies hatte zur Folge, dass sie im Verhältnis zum Westen als Epizentrum, zu Randgebieten wurden, aber durch ihre Entscheidung schufen sie die Grundlagen für eine jahrtausendlange Entwicklung. Dass sie sich dem Westen angeschlossen hatten, brachte sie eindeutig in eine Zwangslage (wirtschaftliche Zwangsbahn, Modellbefolgung, Befolgung der gesellschaftlichen Schichtung), und die damit verbundenen Bedingungen (Adaptation der Staatsorganisation, des Rechts, der Politik, der Kultur) schufen für sie eine spezielle Situation. Sie mussten ständig mit den Symptomen der Disfunktionalität rechnen, was eine natürliche Begleiterscheinung eines „Baus von oben nach unten" ist. Sie waren gezwungen Ersatzmittel (so z.B. Recht, Politik) einzusetzen und durch deren Zwang die natürliche Entwicklung der Gesellschaft zu beeinflussen und zu lenken. Deshalb spielte die Politik in der Organisierung der wirtschaftlichen und gesellschaftlichen Entwicklung eine entscheidende Rolle. Ein Modernisierungszwang war ständig präsent. Der Verfasser schildert die ungarische Entwicklung der Reformzeit (30-40-er Jahre des 19. Jahrhunderts) in diesem Bedingungssystem, die Voraussetzungen und das Umfeld der Revolution 1848, und er platziert die ungarische Revolutionsbewegung auf der Palette der europäischen Geschichte.

SUMMARY

Modernization and Legal Continuity in the History of Hungary (Characteristics of Our Region)

BARNA MEZEY

The essay discusses aspects in the history of the Central and Eastern European "periphery." It focuses on the countries in the Carpathian Basin and the area that lies northwest from it and east of the frontier of the onetime Eastern Frankish Empire. The residents of that region: Slavs and Hungarians first lived in tribes and then, in the tenth and eleventh centuries, joined the community of Christian states. Their newly established states were formed on the Western Frankish, French and German pattern, and as such became integrated into the

mainstream of European progress. They found themselves in the status of periphery by comparison to the centrally positioned Western countries, yet the decision to join Europe laid the foundations for a thousand-year-old evolution process. Their decision to join those Western states forced them to adopt models not exactly of their choice (they had to follow the Western model in the economy and social stratification), and face adverse conditions (in the organization of state, and in adapting Western legal, political and cultural patterns). They had to live with chronic dysfunctions, which are inevitable, when changes are forcibly introduced from the top downwards. Surrogate instrumentalities (legal and political means) had to be employed to influence spontaneous social processes. Politics played an unduly important role in arranging economic and social affairs; and modernization was an unshakeable obligation. The author of the essay discusses the developments in Hungary during the 1830s and 1840s, various aspects of the Hungarian constitutional revolution of 1848, and he puts the Hungarian historical events into a wider European perspective.

FUNCTIONS OF THE NATIONAL ASSEMBLY WITHIN THE CONSTITUTIONAL TRADITION OF HUNGARY

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I. Introduction

When faced with the task of staking out the conceptual lines of division between the various functions of parliament, it seems expedient to refer to what is perhaps the most authoritative definition to date in the field, given by Walter Bagehot in his famous book on *The English Constitution*, where he noted the primary functions of Britain's House of Commons to be elective, expressive, teaching, informing as well as legislative.[1] Public law experts and political thinkers in the 20th century mostly accepted Bagehot's classification in their writings, and drew up similar registers of general parliamentary functions. Some of the most important mentioned, alongside the legislative and elective, include the legitimative function, whereby political views are openly expressed and political wills consolidated, as well as popular representation, integration, and self-government.[2] Others have drawn attention to the controlling powers of national assemblies, or have defined certain specifics to groups of tasks – which nevertheless play highly significant roles in their respective domains of public law – as parliamentary functions (e.g. federal powers). According to another, perhaps equally well-established definition, the prime constitutional functions of parliament are legislation and exercising restraint over executive power. In this view, these two main functions constitute the very reason for the existence of parliaments, and all individual powers of legislation can be hence grouped around them.[3]

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1 Bagehot, Walter: *The English Constitution*. Collins/Fontana, London and Glasgow, 1971. 150–153.

2 Klaus Grimmer: Aufgaben und Zuständigkeiten des Parlaments. In: *Parlamentslehre. Das parlamentarische Regierungssystem im technischen Zeitalter.* (Hrsg.) Raban Graf von Westphalen. R. Oldenbourg Verlag, München–Wien, 1993. 172–173.; Pernthaler, Peter: *Allgemeine Staatslehre und Verfassungslehre.* Springer-Verlag, Wien-New York, 1986. 246-247.

3 Wade, E.C.S.–Bradley, A.W.: *Constitutional and administrative law.* Longman, London and New York, 1985. 47. Szente, Zoltán: *Bevezetés a parlamenti jogba.* [An Introduction to Parliamentary Law.] Atlantisz Könyvkiadó, Budapest, 1998. 40–62.

That said, if however, we extend our inquiries further to include the period of the emergence of national assemblies, we soon find that modern definitions of parliamentary functions are hardly suitable for our purposes. As almost every other constitutional institution of the state, parliaments have evolved over a long period of gradual development until finally reaching their present form, where in line with their intended purposes, they have been incorporated into the system of the overall power of the state. Therefore, to provide a conceptual framework for our topic, we are forced to rely on the so-called „historic national assemblies" for definition. A characterization, which allows us to examine the entire constitutional development of the assemblies themselves, i.e., one inclusive enough to allow for the interpretation and explanation of functional alterations in early national assemblies as well.

In the following then, the term „historic national assembly" will be used as meaning the existing Hungarian state body, which was created and upheld by the historical so-called „thousand-year-old" constitution of Saint Stephen,[4] the first king of Hungary. This heritage, although its functions have changed over time, was at all times vested with a specific scope of powers and functions, and had a definite composition. Furthermore, it was (at least to a limited degree) always a representative body, set up and operated according to more or less undeviating rules of procedure, which had a nationwide competence, and was granted powers of consultation and rule-making.

II. The Development and Original Functions of Historic National Assemblies

Some researchers have traced the roots of the Hungarian institution of national assemblies as far back as the 11th century. This based on documentary evidence that, on certain occasions under the reigns of King László I and King Kálmán „the Book lover", assemblies were held on a national scale where both ecclesiastic and secular dignitaries made appearances. These gatherings, it is claimed, „strongly resembled a genuine national assembly [...] decisions were made here and rules created."[5] However, we should handle those claims with caution, and be prudent in viewing such 11th century assemblages as only the „antecedents" to the Hungarian national assembly. These early forms of the 11th and 12th centuries, which demonstrably served as direct predecessors and perhaps even preliminary conditions of the institution type defined above, and were the

[4] The „historic" Hungarian constitution consisted of the most important conventions and written laws used and enacted during the „one thousand years" from the rule of the state founder, King Saint Stephen (1000-1038). The first and single written constitution was passed only in 1949.

[5] Mezey, Barna (ed.): *Magyar alkotmánytörténet.* [Hungarian Constitutional History.] Osiris, Budapest, 1995. 76.

prototypical vehicle of its activities, are best regarded as the precedents of the institution of national assemblies, if we are to adopt the above definition of the „historic national assembly".

Early consultative assemblies of a nationwide character were, on the other hand, no longer simply the occasional meetings of the ecclesiastic and secular aristocracy, but were instead assemblies summoned annually – pursuant to the provisions of the Golden Bull of 1222[6] – to discuss matters of common interest, or the „affairs of the state", and to advise the king on such matters, or even to hand down decisions concerning various issues.[7]

Hungarian legal historians generally hold that the institution of national assemblies evolved from the days of the royal courts. The Golden Bull of 1222 stipulated that nationwide assemblies be held „on the day of our sacred king" in the city of Székesfehérvár, the coronation city of Hungarian kings, in the presence of the supreme ruler. Here the king exercised his prerogative of jurisdiction, which stated that the supreme judicial power rested at all times with the king. On such occasions, royal jurisdiction was not limited strictly to passing judgments in individual cases, for it soon became customary for the king to interpret, and sometimes to confirm various laws of his kingdom at these court days.[8] Since court days also offered an opportunity for those present to state their grievances to the king, we may regard them as one of the tools whereby control was exercised over the power of the king. Still, the assemblies gathered on the court days held at Székesfehérvár originally had no legislative functions. Their powers were merely that of jurisdiction, or the administration of justice, and the first documents evidencing their rule-making competences date from as late as the end of the 13th century.

After that point in time, we find numerous pieces of evidence for the continuous existence of a national consultative body, since the role of the national assembly is mentioned in several royal decrees. Thus for example, a decree from 1231, and another one from 1290,[9] stipulate that the king's officials must

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6 Act I of 1222. The Golden Bull, quite similarly to the English Magna Carta Libertatum, was a letter of privileges devoted to provide guarantees for the nobility against arbitrary actions of the king and the barons. Its provisions were promulgated in several laws in 1222.

7 According to the Hungarian historian Mihály Horváth, the nobility urged to hold the nationwide assemblies in Székesfehérvár annually, „because the kings got bored with wandering each county separately", in a time, when the enactment of national laws was necessary against the abuses of the aristocratic oligarchies. Horváth, Mihály: *A magyarok története* [A History of Magyars.]. Geibel Károly bizománya, Pest, 1842. 123.

8 Timon, Ákos: *Magyar alkotmány- és jogtörténet.* [Hungarian State and Legal History.] Hornyánszky Viktor könyvkiadóhivatala, Budapest, 1910. 182.; Mezey, op. cit. 76.

9 Hungarian legal historians use the *Corpus Juris Hungarici* as the authentic collection of the ancient laws. Nevertheless, it does not comprise all royal decrees, therefore the documentary collection published by Kovachich, Márton György and by his son, Kovachich, József Miklós in the 19th century, is used too.

render an account of their activities before the national assembly.[10] Another decree worth mentioning is that of King Endre (Andrew) III from 1298, which entitled the national assembly to appoint two of the royal counselors. Such decrees show that the functions of national assemblies were continuously extended beyond that of the administration of justice, to cover various „modern" parliamentary activities, including first of all certain functions of controlling and calling to account related to the system of government, as well as some functions concerning the appointment of officials. In these respects, the Hungarian history of public law shows a pattern of development quite similar to the emergence of Western European parliamentary assemblies. Despite the fact that in some Western European countries the institution of the parliament evolved during the 12th to the 14th centuries simply as a body of representation for the estates, the national assemblies of such Western countries resembled that of Hungary, inasmuch as they could also trace their origins back beyond the emergence of a feudal state organization. This is evidenced by the fact that in many countries consultative bodies, similar to the one in Hungary, were set up beside the *Curia Regis* (or alternatively the *Curia Regis* was itself transformed into a consultative body of sorts), and the establishment of such national assemblies – again in the same manner as in Hungary – took its origins primarily from the decision-making mechanisms of church councils. Such a territorial pattern of organization may very well have signaled the turning point in the development of parliaments, whereby an essentially national institution of power was established beside, or emerged from, the earlier feudal royal council, by integrating into the assembly first the nobility of the entire country, and then all of the estates.[11] The term „parliament", by the way, was supposedly first used in Europe in a chronicle written in 1183,[12] and although it was already widely used in the 13th century, only later did it come to replace the various Latin names used for feudal Diets.[13]

A good collection of royal decrees and laws is available on the Internet, although only in Hungarian: http://www.1000ev.hu/index.php.

[10] The latter decree also prescribed that certain high officials of the central government, like the palatine, the lord high treasurer, or the vice-chancellor, may only be appointed with the approval of the national assembly.

[11] Mezey, Barna and Szente, Zoltán: *Európai alkotmány- és parlamentarizmustörténet.* [European Constitutional History.] Osiris, Budapest, 2003. 582.

[12] Clockie, Hugh McDowall: *The Origin and Nature of Constitutional Government.* Harrap, London. 20.

[13] In Hungary, the earliest written reference to the concept of „parliament" (parlament) is known from the last decade of the 13th century, as the denomination of the national assembly of the day (*parlamentum publicum, parlamentum generale*). In the ancient charters and documents the national assembly was designated by several different names, like *conventio, congregatio, dieta, comitia.* But these were not real nationwide assemblies having lawmaking powers in every case, because a number of them were so-called „partial" national assemblies, in which only few county communities were represented. Ferdinandy, Gejza: *Magyarország közjoga (alkotmányjog).* [Public (Constitutional) Law of Hungary.] Politzer Zsigmond és fia kiadása.

As the judicial assembly became more and more a forum for discussing matters of national importance, the tendency towards strengthening its representational features became increasingly salient. In my view, the last precondition for the emergence of a genuine historical national assembly – beside its institutional consolidation (i.e. it becoming a regularly held event), its nationwide nature, and its function of making rules and discussing national issues – was the development of its representational nature. In some Western European states legislative assemblies were held fairly regularly as early as in the 12th century, and so the notion came to be accepted that certain members of the higher nobility, or certain ecclesiastic and secular dignitaries, must be allowed to participate in the government of the entire country, which required the ruler to consult with them on a regular basis. The first such assembly was quite definitely convened in one of the Spanish kingdoms, although many scholars refer to the parliament summoned in 1265 by Simon de Montfort as the first proper „Parliament". Yet, according to historical records, assemblies were held in 1162 in the Aragon, in 1169 in Castile, and in 1188 in Leon, where not only specific aristocrats, but also the representatives of towns were invited.[14]

The Hungarian system of public law was in all probability one of the earliest in Europe to furnish the national consultative body with a representational nature. Prelates were obliged to present themselves at national assemblies from as early as 1231, and a law enacted in 1267 stipulated that each comitat should delegate two or three noblemen to the national assembly. Eventually, the royal decree of 1290, which we have already mentioned, obliged all noblemen to attend the assemblies in person. Therefore, national assemblies can be said to have evolved from the outset as „feudal national assemblies",[15] where all es-

Budapest, 1902. 434–435. In addition to the partial and general assemblies (*particularia* and *generalia comitia*), until the 15th century, sometimes so-called „universal" (*universalia*) assemblies were convened, when the delegates of the territories belonging to the mother country of the Holy Crown (e.g. Croatia or Dalmatia) were also invited (mainly on the occasions of election of the king or coronation ceremony). Récsi, Emil: *Magyarország közjoga.* [Public Law of Hungary.] Kiadja Pfeifer Ferdinánd, Buda-Pest, 1869. 398. Some historians argue that certain denominations like *congregatio generalis*, *conventio omnium nobilium et procerum regni*, or *parlamentum regni publicum* already referred to the decision-making character of the nationwide assemblies. Kérészy, Zoltán: *A magyar rendi országgyűlés két táblájának kialakulása.* [The Establishment of the Two Chambers of the Hungarian Estate Assembly.] Budapest, 1925. 12.

[14] Mezey and Szentc, op. cit. 581-582.

[15] Kovács, Kálmán: A feudális állam a XIII. század derekától 1526-ig. [The Feudal State from the mid-XIIIth century to 1526.] In: Csizmadia Andor–Kovács Kálmán–Asztalos László (eds.): *Magyar állam- és jogtörténet.* [Hungarian State and Legal History.] Tankönyvkiadó, Budapest, 1981. 111. Contrary to this view, many think that the national assembly can be regarded as being feudal (or estate) assembly only from the 15th (Mezey, op. cit. 77.), or from the 16th (Ferdinandy, op. cit. 437.) century.

tates were represented, because by the time the legislative national assemblies of the end of the 13th century were established, society had more or less become firmly divided into estates, and now the privileged estates – the prelates (*praelati*), the aristocrats or barons (*barones*), and the nobility (*nobiles*) – received personal or „collective" letters of invitation from the king to the annual national assemblies.

It is particularly interesting to note how these early national assemblies came to have certain other functions, which were subsequently also included among the usual tasks of parliaments. Perhaps the most important of these functions was the coronation of kings, which from the second half of the 12th century onwards took place in mass national assemblies convened especially for that purpose. In addition, a decree issued in 1231 made it possible for the assembly to request the dismissal of the palatine (the „deputy" of the king) in the event that he was found at fault in managing the affairs of the king and the country; while the right of calling senior royal officials – and especially the bailiffs of the comitats – to account was transferred to the national assembly under Article 25 of the 1290 decree.

Thus, by the end of the 13th century national assemblies evolved, the functions of which were no longer limited to hearing grievances and complaints, or submitting petitions, opinions and recommendations to the king, but had been extended to include legislation. Thereafter, all subsequent assemblies were characterized by a national trait regarding both their function and their composition, since they discussed and deliberated upon matters which concerned the whole nation, and the aristocrats and prelates invited in person to them by the king covered the whole territory of the country (or the whole of the church organization), while the entire nobility of the country was also allowed to participate in them. The organization of these assemblies thus already included an element of representation – although the term „representation" should be understood here in a special medieval sense, since the higher nobility, the prelacy and the lesser nobility were all directly represented at the assemblies, as their members all participated in person (theoretically at least). The development of the classical representation of the estates reached its full form in 1445, when the delegates of the towns were also invited to participate in the national assembly.[16]

[16] Although the delegates of the free royal boroughs were invited to the Országgyülés already in 1405, the nationwide character of that assembly is sometimes argued. Mezey, op.cit. 77.

III. The Functions of the Fully-developed Feudal National Assemblies

In Europe feudal Diets were organized according to the divisions between the estates, which means that the individual estates held council separately. In the fully developed form of national assemblies attending members of the higher nobility represented themselves alone while, conversely, in the case of the other estates – the lesser nobility, the clergy, or the citizens of boroughs –, the attending delegates represented the interests of the whole of their own estate based on a fixed mandate (or „delegate's instructions"). In England, for example, from 1294 onwards, the royal letters of invitation stipulated that delegates must be vested with full authorization when attending the assembly. At the same time, such early parliaments only had a rather limited and *ad hoc* scope of authority. In other words, the assembly of the estates was convened mostly when new taxes had to be voted, or when an army had to be amassed. Such a legitimative role of the feudal Diet also allowed the representatives of the estates to express their specific interests in the presence of the ruler, for example by reading out a list of their grievances, or by appealing for some kind of compensation. At most feudal Diets in Europe, the three estates of the nobility, the clergy and the citizens of boroughs were represented, but there were also examples of national assemblies consisting of four „chambers" – e.g. in Sweden or in the Aragon – while England developed its bicameral system very early, the structure of which in many respects resembled the later Hungarian form of feudal representation.

As soon as the institution of the early feudal Diet was established in Hungary by the end of the 13th century, the national assembly as a regularly convened legislative body practically ceased to function for a few decades with the consolidation of Anjou rule and the commencement of the reign of the Anjou king Charles I of Hungary (also known as Charles Robert). In the first half of the 14th century the national assembly was rarely convened, and its meetings were not legislative. This function of earlier national assemblies was now assumed by the councils of state or royal councils, since the king discussed all important matters only with the prelates and the magnates (*cum consilio Praelatorum et Baronum*). At the end of the century, however, the movement organized among the nobility succeeded in persuading the king to reconvene the national assembly, and from the first half of the 15th century this institution regained its role as a fundamental part of the legislative process.[17] With the emergence of the so-called Holy Crown Principle, a doctrine expressing Hungary's existence as a

[17] After 1435 only those royal decrees were regarded as laws, which had been issued by the king with the consent of the national assembly. Ferdinandy, op. cit. 434.

state on the basis of the divine authorization represented by St. Stephen's crown, the national assembly was assigned a special role in the realm as a „constituent part" of the Holy Crown, and thus a legislative body equal in rank to the king himself.

From the beginnings of the fully developed feudal Diet, the right of personally attending national assemblies was one of the privileges of the nobility. Because traveling to the assemblies would have been rather costly for the less well-to-do noblemen, by the late 14th century they persuaded the king to allow them, at least occasionally, to send one delegate from each comitat (royal county) who would represent them. Even so, the principle and practice both of participation in person and of representation by delegation continued to be altered from time to time. The obligation of attending the assemblies personally was again introduced on several occasions during the 15th and 16th centuries, furthermore, in some instances severe penalties were specified for those who failed to present themselves at an assembly.[18] But after the devastating Battle of Mohács in 1526,[19] the entire body of the lesser nobility took to participating in the national assemblies by way of their comitats' delegates only, instead of attending in person. (The assemblies were convened indoors after the practice of holding mass national assemblies was terminated.) The last stage in the development of the national assembly, however, was not signaled by the introduction of recallable delegates (*electi nobiles*), who were provided with fixed mandates or delegate's instructions and were meant to redeem noblemen from the obligation of attending in person, but by the appearance of representatives for the free royal towns (boroughs) and thus for the urban freemen (citizens).

As we have seen, the representational function of national assemblies was brought to fullness in feudal Diets, but its essence remained unchanged in the process. On the other hand, of course, the practical significance of this function increased or decreased from time to time, depending on the prevailing political situation, as the interests of the king, or those of the nobility taking a stand against the king, demanded it. King Matthias (ruled 1458–1490), for example, was successful in employing the support of the lesser nobility in his struggles with the barons, whereby the national assembly was immediately promoted to a position of higher esteem. All royal decrees in that period were issued as laws adopted by the national assembly. In a similar fashion, during the reign of the Jagiello kings (1490–1526), the so-called faction of the lesser nobility engaged the barons in a series of spectacular political battles at the national assemblies.

[18] For instance, the Act XLV of 1525 qualified the non-attendance as treason.

[19] The military defeat of the Hungarian army against Suleiman I Turkish sultan in 1526 was a turning-point in Hungarian history, since it led to the dismemberment of the country into three parts (Habsburg rule, Osman Empire and Transsylvania), and resulted in a three-century-long Turkish occupation in the central part of Hungary.

Following the Battle of Mohács, the feudal Diets that were held in the part of the country placed under Habsburg rule served primarily as the main forum for resisting the Viennese court's attempts at centralization and for representing the particular interests of the Hungarian estates.

In my opinion, the subsequent division of the feudal Diet into two Houses (or „tables") did nothing to change the representational nature of the national assembly,[20] although we would be mistaken to claim that the reasons for the division were purely technical. As the representation of the nobility of the comitats was increasingly carried out by way of delegation, a new practice emerged, where the magnates, barons and prelates, all of whom were invited to the Diet in person, held council separately from the delegates, and thus the national assembly was divided into two component parts: the „House of the Estates" and the „Upper House". By the time of the adoption of Act I of 1608, which codified this dual structure of the legislative assembly, the deliberation in two separate chambers and the underlying separation of the aristocracy and the lesser nobility was already an accomplished fact, and the Act merely served to lay the legal foundations for the existing practice.[21]

Even in the framework of the feudal state, the national assembly retained among its fundamental functions the right to elect a king when the throne fell vacant. Because of the absence of a ruler, national assemblies for the election of a king were convened by the palatine.[22]

Another important function of the feudal Diet was its exclusive competence to vote taxes. Exemption from the obligation of paying taxes was already guaranteed for the nobility and the church in the Golden Bull (Act III of 1222), but the right of the national assembly to vote or veto the imposition of new taxes went far beyond that privilege. This meant that the king could not unilaterally levy any new taxes without the consent of the estates. A resolution adopted by the national assembly in 1504 stated that the imposition of a tax was lawful only if it had been voted by the estates.[23] Raising an army (or „voting recruits", as it

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[20] In legal terms, the national assembly was always a uniform body having two constituent parts, the higher and the lower „tables" (after the parliament of 1865/68, the upper and lower chambers or houses). Characteristically, if a statutory law conferred a new task only on one chamber, the house could fulfil it as a special body, but not as a parliamentary organ. Polner, Ödön: *Tanulmányok a magyar parlamenti jog köréből.* [Studies on the Hungarian Parliamentary Law.] Singer és Wolfner kiadása, Budapest, 1903. 8.

[21] Ferdinandy, op. cit. 436–437.

[22] Act III of 1485.

[23] Balla, Antal: A magyar parlamentárizmus eredete. [The Origin of Hungarian Parliamentarism.] In: Balla Antal (ed.): *A magyar országgyűlés története 1867–1927.* [The History of the Hungarian National Assembly, 1867–1927.] Légrády Nyomda és Könyvkiadó Részvénytársaság, Budapest, 1927. 10.

was called) also belonged to the important rights – and, so to speak, functions – with which the national representative body of the estates was vested. Pursuant to the Golden Bull (Act VII of 1222), the nobility was not obliged to contribute to any „wars conducted in foreign parts" by the king, but all noblemen were required to go to war at the side of the king in the event that the country was attacked from outside.

From the point of view of Hungarian constitutional history, the feudal Diet essentially remained a constitutional factor in the exercise of power throughout its existence, even if no national assemblies were convened in the years between 1662 and 1681, 1687 and 1715, or 1765 and 1790.[24] These periods of intermission are almost nothing compared to the practice found in some other countries, where the absolutistic power of the monarch resulted in the dismantling of the representation of the estates, or at least the institution of the national assembly of the estates. See, for example, ante-revolutionary France, where the Estates-General were in intermission for 175 years.

IV. From the Functions of Feudal Representation to Representative National Assemblies

Although no national assemblies were convened in the years between 1812 and 1825, the national assemblies of the subsequent Reform Period were highly significant from the point of view of the development of parliamentary functions among other things, as they paved the way for the emergence of the modern representative national assembly. This not only meant a reinforcement of the national assembly's role as a national institution (e.g. by introducing Hungarian as the exclusive language used in national assemblies), but also led, among other things, to an attempt to make the proceedings of the parliament public.

The laws adopted in 1848, the year of the Hungarian Revolution, at once transformed the political and constitutional features and functions of the Hungarian national assembly, raising the institution of the parliament to the highest level reached by the constitutional development of other contemporary European nations. The most important change of all was the introduction of the representative national assembly elected in parliamentary elections, which replaced the earlier representation of the estates based on fixed mandates. Namely, Act V of 1848 stipulated that „delegates (representatives) to the national assembly shall be elected based on the principle of popular representation", and ordered that the national assembly's House of Representatives be composed of repre-

[24] Vutkovich, Sándor: *A felsőházak szervezete a főbb államokban.* [The Structure of the Upper Houses in the Main Countries.] Pozsony, 1896. 16.

sentatives elected through a voting right that was based on a rating of voters according to their property qualification, gender, employment, and whether they lived permanently in the area where they wished to vote. The Act regarded counties, districts and free royal towns as constituencies. The national assembly's representational function was thus fundamentally transformed, as now the assembly represented the entire nation, including all free Hungarian citizens without regard to any privileges.

Act III of 1848 also had major impact on the functions of the national assembly, because it not only introduced key changes in the relationship between the government („*ministerium*") and the ruler of the country, but also led to an important revision of the relations between the government and the national assembly. The Act stipulated that the members of the Ministry (the contemporary term for the government) were accountable to the national assembly. Thus, the members of the executive body of power were legally responsible for their actions before the legislative body. Ministers could be impeached in certain cases by a majority vote in the House of Representatives, and brought to trial before a court of arbitration, whose members were elected by the Upper House from its own ranks. Both the prominent political movements of the time and the constitutional and historical works written in Hungary since then have interpreted these provisions of Act III of 1848 as encompassing – by implication – the political accountability of ministers before the national assembly. However, this interpretation is highly questionable in the light of the activities of the dual monarchy's Hungarian governments.

Other forms of exercising control over the executive power also developed, or were reinforced compared to earlier traditions. For example, novel features which fostered the evolution of political responsibility of ministers included the obligation of ministers to present themselves in person and report on their activities before either of the Houses upon request, as well as their obligation of presenting their official documents before the national assembly, also upon the request of either chamber.

The year 1848 marks the beginning of a highly significant era in the evolution of the national assembly's control over the financial affairs of the state. Although succeeding national assemblies had adopted a series of laws over the centuries concerning the forms, degrees and limitations of royal (state) revenues, disposal over such revenues had essentially remained one of the royal prerogatives until, following 1848, the entire issue of public funds was practically relegated under the control of parliament. Act IV of 1848, for example, stipulated that the annual budget of the state had to be prepared and endorsed by the national assembly. The right of preparing and consenting to the state budget is essentially a part of exercising control over the executive branch. At

the same time, the legislative body's scope of activities was further extended to include the establishment of the system of taxes, the management of state debts and loans, the levying of customs duties, and the management of the state's assets, as well as other forms of state revenues, such as those acquired from the operation of the railway and postal services, or the government monopolies on mining, salt production and tobacco.

Certain appointments and elections – both to positions created before and after 1848 – still had to be incorporated in law, which meant that the national assembly was required to ratify them. One such position, the origins of which can be traced back to the period when the national assembly of the estates first emerged, was the office of the palatine, but the approval of the national assembly was also needed for the taking office of such „new" constitutional dignitaries as the president of the Court of Accounts or the presiding judges of the courts of appeal.

A special function of the national assembly was the administration of justice in cases concerning the parliamentary elections, as well as jurisdiction over impeached ministers.

As we have seen, the representative national assembly's scope of functions was extended following 1848 – even though the assembly could formally only exercise these new functions through its legislative activities. From then on the national assembly became a continuously operating body of legislation, convened – pursuant to Act IV of 1848 – by the monarch annually during its three-year mandate in Pest, „in the months of winter if the circumstances so allow". Beginning with 1848, the rules regulating the operation of the two chambers of the assembly were laid down regularly in standing orders – although it must be noted that attention had been paid earlier to the establishment and improvement of operational rules as well – and the national assembly was provided with an advanced internal order of operation that was well up to the standards of the era.

But after the establishment of the representative system a period of intermission in the operation of the Hungarian national assembly followed again, similar to that experienced following the full development of the institution of the feudal Diet (i.e. the national assembly itself), as the Hungarian Revolution and War of Independence of 1848–49 was defeated by the combined forces of the Habsburg Empire and Russian troops, the national assembly was not convened again until 1861. In addition, the legislative body that *was* convened in 1861 did not last very long either, and the continuous operation of the parliament was finally restored only in 1865, which means that the national assembly could in fact only exercise the functions described above from that date onwards.

V. The Various Functions of Historic National Assemblies

1. Legislation

While laws were promulgated before mass national assemblies as early as in the 12th century, the function of such occasions was merely to inform the nobility of the contents of royal decrees, thereby making their enforcement easier. Authors discussing the Hungarian tradition of public laws usually agree on one point, namely, that the participation of the national assembly in the making of laws was a requirement under the constitution from the first half of the 15th century onwards, from around the time when King Sigismund (Zsigmond) ruled the country, even though there were instances as early as the end of the 13th century, when certain laws were discussed and even passed by the national assembly.

According to the historical constitution of Hungary, the national assembly was the vehicle of sovereignty, what it expressed through making laws.[25] Seemingly, the underlying principle behind this notion was that of the sovereignty of parliament, which was developed in its classical form in English constitutional law. According to that principle, the legislation's scope of authority cannot effectively be limited because, expressing as it does the supreme will of the state, a legislative body „may draw any matters under its scope of deliberation, and its operations can only be limited in matters where it imposes restrictions upon itself."[26] However, the principle of the sovereignty of parliament was not allowed to prevail in Hungary, since the powers of legislation resided jointly with the king, the people, and the national assembly representing the people.[27] If any one of these players was unable to participate in the law-making process in a constitutional manner (i.e., according to the above detailed components of such participation), then the laws that were adopted could not be regarded as having a legal effect.[28]

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[25] „The task of the law-maker is to express the will of the Souvereign in a compulsory, legal form." Nagy, op. cit. 235.; Molnár, Kálmán: *Magyar közjog.* [Hungarian Public Law.] Danubia kiadás, Budapest, 1929. 389-390.

[26] Ibid.

[27] Werbőczy István Hármaskönyve. [*Werbőczy István's Tripartitum.*] Franklin-Társulat, Budapest, 1897. 229. Récsi, op. cit. 451–452.: Polner, op. cit. 18. In this aspect, there is a general agreement in the literature of the interwar period. See e.g.: Molnár, op. cit. 389–390. or Tomcsányi, Móric: *Magyarország közjoga.* [The Public Law of Hungary.] Budapest, 1943. 455.

[28] Act XVIII of 1635. It was reinforced during the reign of Joseph II in the Act XII of 1791: „His Majesty recognizes that the enactment, the interpretation and the annulment of the laws of Hungary and the attached parts may not be exercised without the National Assembly, since these are the common powers and duties of the king, who has been lawfully crowned and the orders and estates crowded in the National Assembly." Actually this principle had been

Thus in the Hungarian constitutional tradition, the national assembly was a participant in the process of sovereign legislation, wherein its direct supremacy consisted in its powers of legislation being unlimited with regard to their object (meaning that the assembly was free to make laws concerning any matters of the state), and also in its being unrestricted and unaccountable in the exercise of those powers: for example, it was not subject to any limitations imposed by a written constitution. The national assembly's powers of legislation – which included the rights of passing, amending and revoking laws – were restricted only by the institutional limitations imposed by the monarch's right to initiate, and to give royal assent to laws.[29]

The legislative bodies of power, including the national assembly, were required to act jointly also in the authoritative interpretation (*interpretatio authentica*), amendment and abolishment of laws. Although it seems only natural to modern minds to regard these functions as being necessarily incorporated in the power of legislation itself, yet practically ever since legislative powers were officially granted to the national assembly, such obligations of acting jointly were viewed as constitutional guarantees that could prevent the ruler from unilaterally changing the nation's will after it had been expressed by the national assembly.[30]

It was not uncommon that various laws had different territorial effects; for example Hungary and Transylvania were governed by separate laws before 1848, while from 1868 „the lands of Croatia, Slavonia and Dalmatia" had a separate national assembly of their own. At the same time, such territorially restricted

centuries-old constitutional convention already at the time when it was enacted. It can be demonstrated by the fact that those decrees, which had been consented by the king before his or her coronation, were seen as extraordinary, irregular actions. In addition to this, the ordinance of Ferdinand V in 1848 was also controversial. In this ordinance the king, for the time of his illness, transferred his power to consent the laws to the palatine, because the Act III of 1848 empowered the palatine to substitute the king only in the field of the executive powers, not as a part of the legislature. See Nagy, op. cit. 9. It is another question, of course, that following strictly this rigid convention, how this power could have been exercised in this particular situation, when the king was not able to act.

[29] Declared expressis verbis in the Act XII of 1791. Whereas a law can be modified and annulled only by passing a new one, the so-called authentic interpretation can be issued by the coincident declarations of the king and the national assembly, or by their common usages and customs. Récsi, op. cit. 459. and Ferdinandy, op. cit. 69.

[30] Sometimes, (and last in 1604) it occurred in the 16th century, that the king amended one-sidedly, ex post facto the text of a law as it was passed by the national assembly. After the repeated protests of the national assembly, in order to avoid such situations, a new practice was used, according to which the final text of the law had to be based on the agreement of the king and the national assembly (*concertatio*). Eckhart, Ferenc: *Magyar alkotmány- és jogtörténet*. [Hungarian Constitutional and Legal History.] Politzer Zsigmond és fia, Budapest, 1946. 267.

laws were not allowed to contradict the laws passed by the Hungarian national assembly concerning the entire kingdom. A rather specific constitutional restriction was imposed on the national assembly's law-making competences by the so-called Compromise of 1867 between Austria and Hungary, when it was enacted in Act XII of 1867 that in order to create legally valid laws in matters of common importance for both countries, similar acts had to be passed by both the Hungarian and the Austrian parliament.

In Hungarian historic public law, the constituent function of the national assembly must be regarded as a part of its more general legislative function. In this regard, the development of Hungarian constitutional history from the early 19th century more closely resembled English constitutionalism than continental tradition. This was because in Hungary none of the European constitutional movements of the end of the 18th century[31] led to the adoption of a written constitution to replace, or at least to codify, the unwritten historical constitution of the country. Therefore, according to Hungarian constitutional traditions, the legislative powers of the national assembly and the king were not limited by any higher legal norms. Even so, certain laws were sometimes referred to as cardinal or fundamental laws because of their content, but their legal nature was not different from that of the ordinary laws passed by the national assembly. In addition, some laws were occasionally declared to be unalterable[32] – but of course they were never acknowledged as such by the later monarchs and national assemblies.

2. Representation

From the emergence of the national assembly in the 16th century, when the right of the nobility of the comitats to send delegates to the assembly became firmly established, all noblemen were entitled to participate in person in the legislation, and – as we have mentioned earlier – during some periods of the 15th and 16th centuries it was even compulsory for them to attend the assemblies in person. Thus, in the first few centuries of the history of the national assembly, the members of the lesser nobility practically represented themselves, just as the magnates or the barons did. Conversely, representation by delegation was present from the very beginning in the case of the Catholic Church (the state church), and also in the case of towns that were granted the right of sending delegates, i.e. the church was represented by its prelates, the highest ecclesiastic dignitaries, and towns were represented by their delegates.

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[31] See in details in Hawgood, John A.: *Modern constitutions since 1787*. MacMillan and Co. Ltd., London, 1939. and Mezey and Szente, op. cit.

[32] Thus, the Act VIII of 1741 on the liberties and privileges of noblemen was claimed to be unalterable, as it was declared by the so-called Tripartitum, the 15th collection of ancient laws and conventions.

The prelates of the Catholic Church constituted an essential component of the Upper House of the Diet; detailed lists specified the ecclesiastic dignitaries to be invited to the assemblies, and this circle seldom changed. Still, the ruler had some degree of influence over the composition of the prelacy by the exercise of his royal right of patronage, and thus he also had a limited capacity of determining who the ecclesiastic members of the Upper House would be. It should be noted at the same time that the lower orders of the clergy were also represented in the national assembly (as was the case in the French *États Generaux* or in England's House of Commons), since the Lower House of the Diet was partly composed of the delegates of cathedral and collegiate chapters, as well as the abbots and provosts, who were raised to noble rank by the king.

Among the secular dignitaries of the Upper House of the Diet were the magnates, or lesser and higher knight-bannerets or barons, whose membership in the Upper House was due to the leading positions they held in state administration (they included, among others, the palatine, the Lord Chief Justice, the members of the royal council, and later the guardians of the Crown); the hereditary and appointed Lord Lieutenants of the counties also came to be included among the members of the Upper House of the Diet under Act X of 1687.

The Lower House consisted of the members and delegates of the lesser nobility, and the delegates of the free royal towns (and other territorial units), besides the estate of the clergy mentioned above. Various state dignitaries were also included in the Lower House. Like the Upper House, this chamber also had several members, whose membership was based on the office they held (for example the judges of the Royal Court of Appeal). But the comitats still predominated over the Lower House, because according to the traditional interpretation of public laws, the delegates of the free royal towns represented only one noble person each, while the delegates of the comitats represented the entire nobility of their respective comitat. Therefore, in passing its resolutions, the Lower House always based its decisions on the opinion of the majority of the comitats.

The representative national assembly, which brought about enormous changes compared to the representational characteristics of feudal Diets, was introduced in Hungary in 1848, as an expression of the sovereignty of the people – in line with the mainstream ideas of contemporary European constitutionalism, which held that the national assembly was the representative body of the nation's citizens. Afterwards, the estates were no longer represented in the national assembly in their own right, since the members of the Lower House were now elected by voters with suffrage on a territorial basis (in constituencies), instead of being delegated with fixed mandates by the comitats or the free royal towns

under their special legal status as legal persons. Additionally, those who had become members of the Lower House based on the offices they held, now also lost their *sui generis* membership along with the pre-defined circle of ecclesiastic dignitaries previously included in the Lower House.

The system of fixed (or „imperative") mandates used in the feudal Diet was now replaced by the principle and the institution of free representative mandates. Previously, the estates furnished their delegates with letters of commission (*creditiva*) and detailed instructions (*instructiones*) in all important matters, prescribing what opinions the delegates (*ablegatus*) were to express in the national assembly and what sort of votes they were to cast.[33] Delegates were under an obligation to report on their activities, and if the community of noblemen commissioning a delegate was dissatisfied with that delegate's activities, it could revoke his commission. Conversely, the members of the representative national assembly were furnished with a free mandate, which meant that they were not bound by the instructions of their voters, and were free to act in their office as representatives as they deemed appropriate. They were not under an obligation to report to their voters, and they could not be recalled either.

3. Control over the Executive Power

From the very beginning, one of the central ambitions of national assemblies was to secure acceptance of some sort of a general right of supervision over the executive power of the king. Some of the decrees issued in the 13th and 14th centuries were indeed forced or voluntary „promises" from the king to cease from his despotic rule. Following from the same ambition, the national assembly was also vested with certain rights of appointing, or approving of various public dignitaries. Another natural balance delimiting the executive power of the king was the national assembly's exclusive right to raise an army and to vote taxes.

The national assembly's right to hold royal counselors legally responsible for their actions was also introduced very early in Hungarian public law: Act VII of 1507 already stipulated that the national assembly was entitled to administer „pecuniary and personal" punishment to "traitors of the country" and "those who encroach upon the freedom of the realm". The right of jurisdiction over the members of the royal council was important for the national assembly partly because the person of the king was sacred and intangible (just as in other European systems of public law), and consequently could not be kept under

[33] Eckhart, op. cit. 259.

any kind of control. It was therefore necessary first to urge the king to make his decisions only after consulting with his counselors,[34] and then to ensure that counselors would be legally responsible before the national assembly (this process, by the way, was similar to the development of the English system of public law).

The laws passed by the legislation in 1848 constitute an important landmark in this respect as well, because they not only ensured that the members of the Ministry (the contemporary term for the government, which at that time became independent of the monarch's personal rule) would be legally accountable before the two chambers of parliament, but also added certain competences to their powers of control over the executive branch – such as the right to call ministers to account – which were characteristic already of parliamentary monarchies.

As far as control over the executive power was concerned, the legislation of 1848 was one of the most modern constitutional regulations of the era, creating several institutions – from the accountability of ministers to the right of countersigning royal decrees – which pointed beyond the constitutionally limited monarchy and towards a genuine parliamentary monarchy, even if such a form of government could never be established in practice because of the defeat of the War of Independence in 1849.

An important supervisory right of the parliament was that of approving of the state budget, together with its related right of accepting the Appropriation Accounts, which latter was regarded as the performance guarantee of the budget. By approving of the budget, the national assembly ensured the availability of funds for the work of the government, but at the same time also exerted control over government organizations and their activities. Another component of the national assembly's budgetary competence was its right of voting taxes, which incorporated a variety of tasks, from approving the imposition of new taxes to establishing the amount of customs duties and determining the conditions for exemption. It is important to note that from 1870 onwards, the national assembly received help in the exercise of its budgetary functions from the state audit office. This body was established for that special purpose, and was accountable before the parliament; its main function was to control state revenues and expenditures and to supervise the management of state assets and debts.[35]

[34] As it was requested by the Act V of 1507.
[35] Act XVIII of 1870.

One of the oldest forms of exercising control over the executive branch was the elective function, whereby the national assembly exercised its right of appointing or electing various officials. The single most important elective competence of Hungarian national assemblies before 1848 was the election of a king, when the order of succession was disrupted. This involved the right to elect a king (as well as a co-regent (*corregens*) in special cases) and the right of coronation.[36] Historic evidence shows that national assemblies for the election of kings were held as early as in the 14th century, and we also know from documents that the legal foundations, order and preconditions of succession were incorporated in laws on several occasions by the national assemblies, as were the procedural rules of king-making assemblies.[37] The election of a king to the throne, however, was not only a means of ensuring the performance of the highest state function or the continuity of royal power. It also carried with itself several constitutional guarantees relating to the manner of the ruler's exercise of his power. Such guarantees, for example the act of coronation, or the institution of the „royal diploma" (a charter issued by the king upon his coronation) and the king's oath, all involved the king making a solemn promise to abide by the provisions of Hungary's historical constitution, therefore they can be regarded as restrictions imposed upon the executive powers of the ruler.

The appointment of officials to certain state positions connected to the executive power – including the appointment and dismissal of ministers and the delegation and reception of ambassadors – was traditionally a royal privilege, yet the national assembly managed to influence the monarch's decision on several occasions, even if only indirectly and by political means. During the period of the Habsburg monarchy the national assembly's opportunities in this field were somewhat narrowed down: even though it had been responsible for appointing some of the royal counselors from as early as 1298, now it could not exert the desired amount of influence over the dicasterial government.[38] The traditional right of electing a palatine still remained with the national assembly,[39] but it was not entitled to appoint people to the traditional positions of court officials.[40]

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[36] Kmety, Kálmán: *A magyar közjog tankönyve.* [The Manual of the Hungarian Public Law.], Budapest, 1905. 359.

[37] For example the Act XLV of 1498, Act II and III of 1688, or the provisions of the so-called Pragmatica Sanctio of 1723 (Act I, II, III of 1723).

[38] Molnár, op. cit. 649.

[39] As it was prescribed by the so-called palatine provisions of 1485.

[40] One of its reasons was that after the dismemberment of the country into three different parts (1526), the separate Hungarian royal court was ceased.

4. Concluding Peace Treaties, Declaring War, and Signing International Covenants

The rights of declaring war and concluding peace were among the classical royal prerogatives. The king, in his capacity of the supreme commander of the army, disposed freely over the troops. Later that prerogative was modified, so that while the king retained his right of disposing over the army, the right of raising armies was relegated to the national assembly's competence. The Golden Bull of 1222 already declared that the nobility was under no obligation to contribute troops to wars conducted abroad by the king.

The national assembly's „right to vote recruits" was regarded as an important constitutional safeguard. For example, Act XIX of 1790–91 stipulated that new recruits could not be enlisted without the consent of the national assembly, not even by the so-called „free offer" method (which could perhaps be best described in modern terms as raising a voluntary army). Act VIII of 1715 introduced the long-enduring practice, whereby the number of troops „voted" by the national assembly as a *subsidium* – i.e. offered to the king as reserve troops – was exactly the number of troops actually existing at the time. The assembly then also determined the costs of raising and provisioning that army. The above-mentioned right of the national assembly was reinforced following the creation of a standing army in 1715, although it has to be noted that the parallel obligation of the nobility to „rise" in defense of the realm was maintained right up to 1848.

5. The Self-Governing Function of the National Assembly

The self-government tasks related to the internal affairs of the national assembly constitute a special function. Certain aspects of this power of the national assembly were safeguarded by special parliamentary privileges in order to guarantee the freedom of the parliament, which meant more specifically that the national assembly, in administering its own affairs, could exercise certain rights – of an administrative or a quasi-judicial nature, for example – which otherwise were reserved for other state bodies.

A fundamental aspect of the parliamentary right for self-government was that the national assembly could establish its own internal organizational structure and rules of operation. The first standing orders were adopted by the national assembly of 1790–91, but it was under Article 10 of the Act IV of 1848 that the two Houses of the Diet were first expressly authorized to create their own

standing orders. (Incidentally, the pattern was most probably borrowed from French legislation).[41]

Parliament's self-government rights included the right to establish the authenticity of the representatives' mandates. Pursuant to this parliamentary privilege, the national assembly was entitled to check whether representatives were properly entitled to their membership in parliament, and also to administer justice in cases related to the parliamentary elections. This latter right was then relegated to the competence of the High Court of Justice in 1874, even though the law which carried that relegation into effect was passed only twenty-five years later, in 1899.

The national assembly's right of self-government also included, from 1875 onwards, the right of passing judgments in cases of incompatibility and the title to resolve on immunity and disciplinary matters.

SUMMARY

Functions of the National Assembly within the Constitutional Tradition of Hungary

ZOLTÁN SZENTE

The article examines the development of functions of the early Hungarian national assembly. To discuss the changes of functions from the establishment of the feudal Diet up to the modern, representative Parliament, it suggests a conceptual framework for the 'historic' national assemblies. It argues that the roots of the modern Parliament can be traced back to those national assemblies, which were no longer simply the occasional meetings of the ecclesiastic and secular aristocracy, but were instead assemblies summoned annually by the king in order to discuss and decide on public affairs of nationwide interest. Although some differences can be discovered between the functions of the earlier, the fully developed feudal Diets and the modern representative Parliaments, there was an inherent logic in their development, namely, the gradual strengthening of the legislative function as well as the control over the Executive Power.

[41] Búza, László: *A képviselőház házszabályai. Államjogi tanulmány.* [The Standing Orders of the House of Representatives. A Study on Law of State.] Sárospatak, 1916. 7–8., and Szente, op. cit. 23–28.

RESÜMEE

Die Rolle der Nationalversammlung in der ungarischen Verfassungstradition

ZOLTÁN SZENTE

Der Artikel untersucht die Entwicklung der Funktion der frühen ungarischen Nationalversammlung. Um die Veränderungen zu erörtern, die in der Zeitspanne von der feudalen Diät bis zum heutigen modernen, repräsentativen Parlament in bezug auf die ausgeübte Funktion vonstatten gingen, schlägt der Autor einen Konzeptrahmen für die „historischen" Nationalversammlungen vor. Er argumentiert damit, dass die Wurzeln des modernen Parlaments auf jene Nationalversammlungen zurückgehen, die nicht mehr nur als gelegentliche Treffen der kirchlichen und säkularen Aristokratie dienten, sondern einmal jährlich vom König zum Zwecke der Erörterung und Entscheidung von öffentlichen Angelegenheiten einberufen wurden, und die für die ganze Nation von Bedeutung waren. Obwohl die gleichen Unterschiede zwischen der Funktion der frühen, der voll entwickelten feudalen Diäten und dem modernen repräsentativen Parlament beobachtet werden können, doch war in ihrer Entwicklung eine bestimmte Logik eigen, nämlich die allmähliche, laufende Stärkung der legislativen Funktion, sowie der Kontrolle der Exekutivmacht.

CHANGES IN THE CONSTITUTIONAL STATUS OF THE GOVERNMENT SINCE THE CHANGE OF REGIME (FROM „OUR PARTY AND GOVERNMENT" TO THE EUROPEAN UNION)

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The entire Hungarian constitutional system transformed right at the onset of transition from a single-party to a multi-party system. The organizational changes are well known: instead of a collective presidency, a single president was named, the Constitutional Court and the State Audit Office were set up, etc. Behind the dramatic changes lie differences between Communist and Western-type interpretations of constitutionality. The first one was based on the single-party rule, the unity and indivisibility of power and a matching hierarchy; the latter on the separation of powers and the principle of responsibility that follows from it. As far as the Government was concerned, the changes were less spectacular but more far reaching. This paper sheds light on the key constitutional aspects of that process.

Before Transition: „Our Party and Government"

Before 1990, the definition of the status of the Government [officially called „Council of Ministers" at that time] was ambiguous [ambiguity in the status of institutions being common at that time]. The theoretical literature modestly [and in compliance with a complex hierarchy] referred the Government to the category of executive agencies, and described it as the highest ranking among them [and that could be seen on the so-called static model of state organizations]. However, political praxis assigned the Government to the centre of the system of state agencies. The Council of Ministers played a crucial role in the [Communist] party control of state agencies. The Party [officially called: Hungarian Socialist Worker' Party] could „reach" all state agencies via the Council of Ministers. When it intended to reach organs of public administration or state-owned enterprises, it relied on the strict rules of sub- and superordination and a command economy, and in the case of institutions of other types, such as the National Assembly, the Presidential Council of the People's Republic, etc., it issued orders *that were camouflaged as recommendations.*[1]

Thus, the political phrase „our Party and Government" was not incidental. Let us add that the Council of Ministers had the task of imparting a state form and binding force for party intentions.

Due in part to the above circumstances, in the course of the constitutional change of regime the Council of Ministers received a treatment that differed from that of any other constitutional institution. The architects of the change of regime sought to increase the competence and constitutional weight of the National Assembly and the courts, so that they could fulfil the role assigned to them along the classical history of constitutional development. By contrast, they sought to restrict the competence of the Council of Ministers, because that was identical with eliminating the single ruling party and its hegemony.[2]

Constructive Vote of No Confidence

Just as in the case of other constitutional institutions, transformation occurred in several stages yet fast.

As it has been mentioned above, the new constitutional system was based on the principle of responsibility, and that replaced the earlier principle of hierarchy. At constitutional level, this change mainly affected the relationship between the Government and the National Assembly.

A brief reminder for the reader: before the constitutional change of regime the Council of Ministers and its members had an indefinite mandate. Legally speaking, it meant that the length of the mandate, composition, etc. of the Government depended on changes in the country's political line instead of decisions of, or cycles in the operation of the National Assembly. Note that the country's political line was usually readjusted at party congresses, sessions of the Party's central committee, party resolutions, etc.

The political and institutional changes in the Government occurred following the amendment of the Constitution by Act VIII of 1989 and Act IX of 1989, which amended Act III on the Legal Status of State Secretaries. According to those provisions, the mandate of members of the Council of Ministers may also end when *confidence is withdrawn from them.*

Act XL of 1990 was adopted by the newly elected National Assembly, which introduced the institution of constructive vote of no confidence – which in turn can be seen as a theoretical, conceptional and historical mutation of the responsibility of the executive power before legislature.

The essence of the constructive vote of no confidence is well known: a censure motion may only be submitted, if it is accompanied by a recommendation for a new prime minister, etc. It will be recalled that the idea behind that institution

is to prevent protracted government crises, that is, situations when there is a long time between the termination of the mandate of a government and the election of a new prime minister and new government. As far as that purpose is concerned, the Hungarian version of that institution has been fulfilling its political mission. Its critics claim that the constructive vote of no confidence prevents the assertion of the basic requirement of ministerial responsibility. A censure motion may only be submitted against a prime minister and not against individual ministers; a vote of no confidence against individual ministers counts as a censure vote against the prime minister, etc. Some recommendations have been tabled to resolve this „contradiction" (for instance, when in 1994-98 preparations were made to draft a new Constitution): in case a censure motion is introduced (and carried) against a minister for the fourth or fifth time, that minister should resign. At stake here is the confirmation or abandoning of the essence of that institution: it is part and parcel of the constructive vote of no confidence that political confidence must be presumed between the prime minister and his/her ministers. A prime minister could in principle tie his/her mandate – politically – to the mandate of his/her minister, even without the constructive vote of no confidence. It is a mistake to think that in countries, where ministerial responsibility is defined in a traditional manner, it is possible to secure the resignation of a minister with a censure motion against the will of the prime minister. In countries like that the presumed political confidence between the prime minister and his/her minister is asserted by political means, while in countries committed to the constructive vote of no confidence, by legal means. Let us stress that the constructive vote of no confidence does not mean relinquishing the political responsibility of individual ministers. Ministers have the obligation to respond to questions and interpellations in the Parliament, etc.

The constructive vote of no confidence has been serving its purpose: over the past 15 years Hungary has not experienced any major and protracted government crises and the parties in majority retained their government position. That process has not been broken by the related constitutional provisions, but a law adopted in 1997 on the responsibility of ministers. That law defined a time limit of 30 days for the resignation of a prime minister. As we will see in more detail below, later on a confused constitutional situation occurred as a consequence. Suffice it to mention here that the law concerned contradicted the constitutional objective of the constructive vote of no confidence, because it has lengthened government crises. (Let us emphasize: a government crisis is not identical with a constitutional crisis; a government crisis is resolved in compliance with constitutional rules.) An example was the change of government in Hungary in the summer of 2004. (The former prime minister resigned in accordance with the relevant constitutional provisions, yet the president of the re-

public only appointed the new prime minister after the thirty-day „resignation period" elapsed, as required by the law on ministerial responsibility. In the meantime, the constitutional status of the prime minister, who had resigned, was unclear.)

There is only one open question concerning the present-day *constitutional regulation* of the institution of the constructive vote of no confidence: what if a parliamentary majority does not accept a person recommended by the president of the republic for prime minister? Article 63 of the German Constitution (which the framers of the Hungarian Constitution considered as an example) provides for such cases: „If the person elected (as Federal Chancellor) obtained the votes of the majority of the members of the Bundestag, the Federal President must appoint him within seven days from the election. If the person elected did not receive this majority, the Federal President must within seven days either appoint him or *dissolve the Bundestag*." The framers of the Hungarian Constitution have not adopted this provision, which, by the way, is regarded as a procedural stipulation belonging to the assertion of the constructive vote of no confidence. Note that if the president of the Republic of Hungary had the powers to dissolve the National Assembly or appoint a minority prime minister, he/she would have a much stronger constitutional position, than what is the case today. (About half of the principal political forces would have never accepted such a formula.) Under such conditions, assertion of the constitutional rule that the prime minister of the time must enjoy the confidence of the majority of the National Assembly, cannot be considered elegant in terms of constitutional law. In case the National Assembly „makes the appearance" of accepting the recommendation of the president of the republic, but immediately after that introduces a censure motion against him/her, then the prime minister wins his/her office „without the good offices" of the president of the republic. Fortunately, in Hungary it has not occurred yet that the National Assembly failed to elect a prime minister in the absence of the required majority.

Under the conditions of the constructive vote of no confidence the right of Members of Parliament to submit interpellations preserves the responsibility of the Government and the ministers in a way that differs from the usual pattern. Let us add: over the past one and a half decades in Hungary the right of interpellation has had some specific offshoots. As it is well known, interpellations and parliamentary questions are instruments of the supervision of legislature over the work of the executive power. Hence, it follows that it is typically used by Members of Parliament of the Opposition. However, in Hungary Members of Parliament of the government parties have also interpellated their Government and its members. Yet, a closer look at those interpellations shows that they offered the opportunity for the Government or the MP concerned (or both) to show off their „serious efforts," that is, they were PR.

Interpellations and questions are not the only ways the National Assembly may call the Government to account. *Reporting* is another way. Before the change of regime the Hungarian Constitution, just as that of other Communist countries, obliged numerous state organs to report about their work for the supreme organ of state power. There were diverse legal relationships between the National Assembly and the addressees of that obligation. Those organs were under the obligation to submit a report, because state power was unified and indivisible, and there was consensus *in principle* on the undisputed primacy of the National Assembly. Today, the obligation to report to the National Assembly concerns the Parliamentary Commissioner for Human Rights, the President of the State Audit Office, etc. Article 39 (1) of the Constitution provides that "The Government is responsible to the National Assembly for its operation and is required to *submit regular reports* to the National Assembly about its work" (*author's italics*). The individual ministers are also under the general obligation to report about their work, which is not in full harmony with the institution of the constructive vote of no confidence. Certain laws may also request reporting to the National Assembly, in such cases the subject of the reports is spelled out in those rules of law. For instance, the Government must report to the National Assembly about its programme of legislation and the way it is implemented.

The Constitution and the other key rules of law are not entirely compatible with the obligation of the Government (which dates back to the Communist times) to report to the National Assembly. The Standing Orders of the National Assembly has transformed the Government's constitutional obligation of reporting into the institution of a *day of political discussion*. In case the Government or at least one fifth of the Members of Parliament recommend that in writing, the National Assembly must hold a day of political discussion on the broad political issue defined in the recommendation. In the course of implementing the Standing Orders, the reports made by personalities, who have this obligation according to the Constitution or some other law *have to be considered as reporting*. Such reports inform the National Assembly about measures taken, inquiries conducted and the activities of some agency. (Articles 89[3] and 98 [1] of the Standing Orders)

Notwithstanding the fact that the principle of responsibility dominates the relationship between the National Assembly and the Government, the Government plays a central role in coordinating and influencing the operation of state agencies. Still, it must operate as the Government of the National Assembly and not as that of any party. Examining the question from a theoretical point of view, we also have the opportunity to quote the concurring opinion of László Sólyom, President of the Constitutional Court (CC) at that time, attached to Resolution 53/1996 (22 November) of the CC: „the prohibition on parties to exercise power directly ...and several provisions of the Constitution on the

prohibition of public officeholders being party members... are general arguments to confirm that the 'will of the people' as conveyed by the parties may only assume the form of state power via the representative bodies."

Ministerial Responsibility: the „Destructive" Way of *Regulation by Laws*

(a) We can describe the constitutional formulation and practical implementation of the constructive responsibility as successful. True, there have been some problems with practical implementation, but that is attributable to Act LXXIX of 1997 on the Legal Status and Responsibility of Ministers and State Secretaries (hereinafter referred to with its Hungarian acronym: Kjf.). The Constitutional Court has recently requested the amendment of a provision of that law, yet several reservations can still be raised. The *anomalies stem from the regulation itself*, and they might bring about a crisis in constitutional life. That is what the word „destructive" refers to in the subtitle above, so it should not be interpreted as the opposite of constructive responsibility, when no confidence in the Government is separated from the decision on the composition of a new Government.

When we mention the constructive vote of no confidence, we bear in mind the rules of political responsibility as interpreted according to the Constitution in effect. Essentially, it means that the Government enjoys the political confidence of the legislature; and when that confidence is undermined, the Government loses its mandate.

Responsibility in terms of (constitutional) *law* is related to the infringement of the Constitution, laws and other rules of law. That form of responsibility involves damages under civil law and measures under criminal law, etc.

The *legal responsibility* of ministers was first regulated by Act III of 1848. It listed acts that may incur calling the ministers to account. „All acts or decrees that violate the country's independence, the guarantees of the Constitution, the effect of the law in force, individual freedom or the sanctity of property..., appropriating money or other valuables that are given to their trusteeship..., omissions in implementing the laws or maintaining public order..." (Article 32).

The Constitution of 1949 – which was diametrically opposed to the principles of Western-type constitutionality – provided that „The Chair (Deputies) and members of the Council of Ministers are responsible for their measures and conduct also individually. A separate law [sic!] shall regulate the *way of calling them to account*." (Article 27)

Until the constitutional change of regime the implementing decree for the said provision of the Constitution was Act III of 1973. It provided that the responsibility of the members of the Government in terms of labour law, administrative law, etc. shall be adjudicated under the relevant laws, yet eventually the *procedure* of calling those officeholders to account was never enacted.

What Act III of 1848 stipulated about the responsibility of ministers was in force until as late as 1973.[3]

(b) The Constitution presently in force provides (in Article 39) that the „Members of the Government are responsible to the Government and Parliament, and shall provide the Government and Parliament with reports on their activities. The legal status, compensation and method of accountability of Members of the Government and State Secretaries shall be regulated by a law."

The National Assembly had failed to adopt the law referred to by the Constitution for a long time. In its Resolution 49/1996 (25 October) the Constitutional Court annulled some related rules of law, and declared that the omission to adopt that law violated the Constitution. Next year Act LXXIX on the Legal Status and Responsibility of Ministers and State Secretaries (Kjf.) was enacted.

Conceptionally, ministerial responsibility involves consequences that belong to civil law, criminal law, etc. The Kjf. fails to specify them. Therefore, provisions of Article 225 of the Criminal Code on crimes related to office have to be applied. Legislators should have asked themselves the question, whether there were any penal categories, where only a minister can be the perpetrator. (There are such categories for the president of the republic, and the Constitution defines the related procedural rules.) The framers of the Kjf. could also have considered, who is entitled to initiate criminal proceedings against a minister in connection with a crime committed in the course of his or her official activities. Restrictions on that account – which may not be interpreted as immunity – could have protected ministers from unjustified harassment. (During the preparatory stage of that law, one of the early versions of the text would have granted ministers immunity in a similar manner to Members of Parliament, which is a theoretical nonsense. Immunity has always protected Members of Parliament from executive power. If ministers had immunity, that could have produced the constitutional nonsense where, for instance, it protected the minister of the interior from the harassment of police, which that minister supervises.)

It would be worthwhile formulating special rules for (in effect removing from the competence of the executive power) cases where ministers are involved (investigation and prosecution), because that would guarantee that also ministers would be called to account if they commit a crime, but they could be protected from unjustified harassment.

The Kjf. fails to define the length of time while a minister is legally liable for his activities after the termination of his or her mandate. Neither does the Kjf. include provisions on who and under what conditions may grant pardon to a minister, who has been called to account under the criminal law.

The absence of special criminal law regulations is felt even more keenly as, under the Constitution presently in force, Members of Parliament as well as non-members may be elected or appointed prime minister or minister. Under the present regulations, the prime minister and ministers enjoy immunity if they are Members of Parliament, but those members of the Government, who are not Members of Parliament, do not have immunity.

(c) The Kjf. fails to regulate certain action in the field of criminal law that such a law should, and to which the Constitution grants entitlement. However, it is excessively eager, relative to certain constitutional provisions connected to members of the Government and state secretaries, since it widens the circle of the subjects covered by such a regulation: in addition to regulating the responsibility and legal status of members of the Government, the political and administrative state secretaries, it also regulates these questions concerning *deputy state secretaries*. The motivation behind this is not quite clear. This formula undoubtedly lends prestige to the rank of deputy state secretary, however, it indicates the erosion of a theoretical and practical borderline between two divisions of executive power: public administration and the governmental machinery. Appointments in public administration are made under the law of public administration, while appointments in government are made under constitutional law.

The pivotal principle of the Kjf. is that it creates a relationship alongside the one that connects the National Assembly and the members of the Government. This other relationship shows the characteristics of public administration and public service, and it covers the members of the Government, the political and administrative state secretaries and deputy state secretaries. The framers of the Kjf. posit that there is a labour relationship among the persons involved. The law provides that, unless otherwise provided, the minister's employer is the prime minister. [Article 10 (2)] There is some inconsistency here, however, as no one is named to exercise employer's rights in relation to the prime minister.

The way the Kjf. regulates said issues elicits the question: is it possible to apply the rules of public administration, civil service and employer-employee relationship to the executive power? Note that it is explicitly forbidden under German law[4] – and that is not incidental.

From the viewpoint of constitutional law, the application of the rules of public administration and civil service to the governmental sphere (which belongs to the domain of constitutional law) is questionable on at least two points.

(1) Responsibility in public administration and in civil service mainly works in terms of hierarchy, yet ministerial responsibility lies outside the realm of super- and subordination. Legally speaking, a minister may not get orders from the legislature, the Government or the prime minister. An interpretation that works otherwise is doomed to ruin ministerial responsibility.

No minister may elude responsibility claiming that he/she acted (or did not act) at the order of the legislature or the prime minister. In the present Hungarian constitutional system the Government or the prime minister may assert their will through political means or through indirect constitutional means. For instance, the president of the republic appoints or relieves ministers at the prime minister's recommendation. In case a prime minister is unable to assert his or her will through political or constitutional means, the use of legal means or issuing orders cannot help. The principle of political solidarity – which has to be taken as granted in the relationship of the prime minister and the ministers – must not be confused with super- and subordination in a hierarchy.

(2) The other consideration is related to the *disciplinary right*, which is part of the employer's rights. In case a prime minister exercises employer's rights over the ministers, he/she may only do so by curtailing the powers of the National Assembly. In other words, the legislature loses the powers to call the executive to account, which means the executive will judge its own deeds.

The Kjf. includes provisions about the financial responsibility of ministers. It fixes the limit of compulsory indemnification at the minister's pay of two or six month. Note that the harm a minister can cause might run to tens of millions of forints or more. The Kjf. defines the principles and rules of calling ministers to account financially, just as in the civil service: the minister's liability for damages is decided by the prime minister at the recommendation of the disciplinary council. As the National Assembly is excluded from this process, the executive power judges its own acts; and it may even exonerate itself from responsibility.

(d) Referring to the prime minister, the ministers, state secretaries and deputy state secretaries as *state leaders* the Kjf. uses a terminology that is unusual in classical constitutional law. The Kjf. divides state leaders into two groups: *political leaders*: the prime minister, ministers and political state secretaries, and *professional leaders*: administrative state secretaries and the deputy state secretaries.

(e) The introductory part of the Kjf. defines the conditions of the election/appointment of the members of the Government, state secretaries and deputy state secretaries, and spells out the rules of *conflict of interest*. Description of the details would run beyond the competence of this paper. Suffice it to say here that a state leader may not pursue an activity that is *not worthy of his/her office*, and the administrative state secretaries and deputy state secretaries must act free of partisan bias or any other outside influence.

The Kjf. refers questions of conflict of interest in the case of the prime minister to the National Assembly, and in the case of ministers to the president of the republic. In the first case, initiatives may be made by any Member of Parliament (!), in the latter by the prime minister.

The concept „unworthy of one's office" is so general that it can hardly be separated from the causes that might lead to a vote of no confidence against the Government, which under Article 39/A of the Constitution, may only be introduced by one fifth of the Members of Parliament, if a candidate for a new prime minister is proposed simultaneously. Any Member of Parliament, however, may claim that a prime minister has acted in a manner that is unworthy of his/her office, and in such a case the sponsor of the motion does not need to recommend a new prime minister. If it is a censure motion by Members of Parliament, it has to be sponsored by one-fifth of the House and an alternative prime ministerial candidate must be put forward, while it is next to impossible to differentiate among the causes of the various motions at removal. In our opinion, what we have here is a new form of the institution of no confidence, because as long as a censure motion is tabled, the activity of the prime minister is „assessed" only by the Member of Parliament, who submits the motion at conflict of interest. A censure motion, just as when a conflict of interest is established, may incur the termination of the prime minister's mandate. Such a regulation of the conflict of interest in the context of the constructive vote of no confidence may raise questions of constitutionality.

As far as a conflict-of-interest motion against a *minister* is concerned, it may not be tabled by the National Assembly or Members of Parliament. Only the prime minister may do so, what for practical purposes is identical with disciplinary rights. In principle, the prime minister may act contrary to the intentions of the National Assembly: the *non-submittal* of a motion about conflict of in-

terest, or a negative decision on that question means immunity for the minister. If such decision latitude were transferred to the president of the republic, that would inevitably implicate the head of state in partisan politics.

(f) The Kjf. complements constitutional provisions on the way a prime minister and ministers receive their mandate and the way it is terminated. It defines rules of procedure including time limits, which cannot be found in the Constitution. For instance, a prime minister, or the Government, may tender his/her/its resignation – to be submitted to the president of the republic and addressed to the Speaker of the National Assembly – by requesting *thirty days of notice*. (Article 7) Ministers, etc., may also tender their resignation with thirty days of notice.

Said procedural rules prove that the framers of the Kjf. only had considerations and principles of public administration in mind. When the Kjf. was challenged with reference to the letter of constitutional law, the Constitutional Court voted in favour of the petition. Decision 884/B/2004 of the Constitutional Court annulled the Kjf's provision about the thirty days' notice. Let us add: the Constitution *does not authorize* the National Assembly to formulate procedural rules for the termination of the mandate of the prime minister and the ministers. That is not the *only* cause, why said provisions are unconstitutional. The same conclusion can be made upon subjecting the Constitution to a systems analysis. The *raison d'être* of the institution of the constructive vote of no confidence is to limit any government crisis that is concomitant to a change of government to the shortest possible time. That was evidently on the mind of the framers of the Hungarian Constitution, when they adopted it. The provision in the Kjf. that the prime minister may resign from his/her office with thirty days of notice lengthens the government crisis related to such a resignation, which causes uncertainty in the operation of the governmental machinery.

The Kjf. includes detailed provisions about the pay ministers are entitled to during and after their tenure, yet it is silent on the conduct they are expected to pursue after their mandate ends. *In the private sector* people in senior positions often get considerable severance pay on leaving their companies, as their former employers expect them not to join competitor firms. In a similar manner, it would be desirable to regulate past ministers' conduct and oblige them to keep official secrets, refrain from using inside information for private gain and/or to the detriment of the state – *at least* in proportion to the size of the „severance pay" they get. As the Kjf. includes no provision about such expectations, it seems that the money ministers get on leaving their post is simply a compensation.

Those and other reservations about the Kjf. are more than enough to justify a thorough constitutional examination of that law. The government crisis Hungary experienced in 2004 has been resolved. Our subjective remark is that the only reason why that government crisis did not escalate into a constitutional crisis was thanks to the wisdom of the president of the republic. But however important the human factor is in the life of a country, it is an axiom of constitutionality that power conflicts should be resolved in compliance with pre-established norms.

The Formation of the Government

Hungary's Constitution provides that „the Parliament shall hold the vote on the election of the Prime Minister and on the adoption of the Government's programme at the same time. ... The Government is formed upon the appointment of the ministers." (Article 33 of the Constitution) Said provision was first included in the Constitution based on Act XXXI of 1989 on the Amendment of the Constitution. It tied the Government to the party (parties) in majority through the National Assembly and not in a direct manner. That formula was taken over by Act XL of 1990, which introduced the constructive vote of no confidence. Today the phrase „government programme prior to the formation of the Government" is regarded as a contradiction in definition. Partly in connection with the role a prime minister candidate plays during the general elections, it is doubted, whether the parliamentary vote should be held simultaneously with the adoption of the programme of the Government. If the programme of the Government were adopted later, in a less improvised manner, the newly appointed ministers could take part in the parliamentary debate of the government programme that would realistically assess the state of the country.

The Composition of the Government

(a) Neither the Constitution, nor the Kjf. carry restrictions on who may become a member of the Government: Members of Parliament and non-Members are equally eligible. The philosophy behind that is to make it possible both for *experts on constitutional affairs* and *politicians, who are not directly associated with the majority party (parties)* to become government members, irrespective of whether they are MPs. Consequently a key principle of the separation of powers is not honoured: people, who participate in the executive power should not take part in legislation. We cannot raise objections against that. However, we find it objectionable that Hungary's legal system fails to be consistent on that point. There is a flagrant contradiction: ministers, who are Members of Parliament enjoy immunity, whereas those who are not MPs do not.

That contradiction may not be resolved in a way – which was originally proposed by an early draft of the law on ministerial responsibility – to extend immunity to all ministers. It follows from the historical and theoretical logic of the institution of immunity that the Members of Parliament need to be protected from harassment by the executive power, that is, the Government. Under the present legal conditions it may not be ruled out, for instance, that the tax authority is carrying out an inquiry in the finances of the minister of finance, who oversees the work of the tax authority. As a consequence of a mistake in legislation, in such cases the prosecutor's office *does not have exclusive* powers of investigation. (The prosecutor's office has exclusive powers of investigation relative to, *inter alia*, the officeholders elected by the National Assembly, yet the ministers are not elected by the National Assembly: they are appointed by the president of the republic.)

In Hungary, before 1990 the Council of Ministers included, in addition to ministers who headed the ministries and ministers without portfolio [who were officially called ministers of state], *officeholders who headed certain committees*. That state of affairs was maintained even by Act XXXI of 1989 with the proviso that only ministers could be appointed to the head of those committees. Thus, ministers could either lead a ministry or head a committee or national office. What really mattered – this was the official explanation at the time – was that they should be ministers. In our view, at that time the assertion of ministerial responsibility was not consistent.

Act XXXI of 1989 repealed the position of *deputy prime minister*, and that helped rendering ministerial responsibility more consistent. The post of deputy prime minister was incompatible with traditional Western principles of ministerial responsibility, and it evidenced that the state agencies were directed by a single party, and that the pattern of public administration reflected the public ownership of the means of production, and that ministries were arranged in compliance with the branches of the economy. Each deputy prime minister was responsible for some ministry and had the powers to instruct ministers.

Act XXXI of 1989 did not make it compulsory to establish a separate post of deputy prime minister, yet it enabled the prime minister to appoint one of the ministers of state to substitute him, if need be. (Over the past one and a half decade the idea to re-establish the post of deputy prime minister in the Constitution has kept re-emerging, as for instance when the text of a new constitution was drafted.)

The title *minister without portfolio* is a product of the constitutional change of regime. The Constitution does not limit their number. Article 37 (2) of the Constitution stipulates „The ministers without portfolio shall attend to the responsibilities determined by the Government." A minister without portfolio

may head an organ of public administration. For instance, Act LI of 1990 commissioned a minister without portfolio to oversee the work of the national security service. In our view, the idea behind that formula was to relieve the prime minister from direct political responsibility. Most recently, the title of minister without portfolio has been receiving the same acceptance as that of ministers.

Is the Government a Collegiate Body?

When examining the structure of the Government, we have to take two contradictory points of departure into consideration.

> *(1)* Traditional Western approach differentiates between two attributes of the Government in constitutional law. From a legal point of view, the Government is not a collegiate body, because an opposing interpretation would run contrary to the principle of responsibility. The members of the Government may not elude responsibility claiming that they do, or do not do, something at the order of the Government as a body. From the viewpoint of political responsibility (as interpreted within constitutional law), the members of the Government are attached to one another, and especially to the prime minister, via the principle of political solidarity. If political solidarity is missing, a minister's mandate is likely to be ended.
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> *(2)* The case is different with *Communist* constitutions. Under a Communist constitution the Government is a collegiate body legally as well, however, the relationship between the prime minister, the Government and the ministers is hierarchical.

The two approaches differ for various reasons. First, because in Western societies there are several parties, while in Communist countries there was just one party. Secondly, in Western constitutions responsibility and accountability are basic assets, while for Communist constitutions the *method of decision-making*, the collegiate principle was regarded as an asset. (It is another question to what degree were the decisions made by those collegiate bodies, genuine or formal.)

In the Hungarian Constitution reference to the collegiate nature of the Government has been waning. That corresponds to the institution of the constructive vote of no confidence, the requirements of multi-party system, etc. However, other rules of law do not yet sufficiently reflect the transformation of constitutional rules since the change of regime. According to (the several times amended) Government Regulation 1088/1994 (20 September), the Government shall exercise its functions under the leadership of the prime minister *as a col-*

legiate body. In decision-making the members of the Government shall have equal vote. Decisions shall be made by majority vote; and in a tie the prime minister shall have the casting vote. The decisions of the Government shall be declared by the prime minister; etc. In case the term "collegiate body" means that the Government passes its decisions by majority vote, this contradicts the aspects of the constructive vote of no confidence, which says that a censure motion may not be submitted against the Government, only against the prime minister. The principle of collegiate body is not in harmony with the requirements of *coalition government* either, because if that is asserted, a government by a coalition of parties would be impossible.

Transparency

The activities of the National Assembly are explicitly and characteristically public. It goes without saying that those of the Government are not. Neither would it be a legitimate demand to make government meetings accessible to the public. However, it is justified to claim transparency for the whole of governmental activity, partly from a constitutional, partly from a political aspect. As for the first aspect, it refers to the Government's relationship to the National Assembly, as for instance, responses to interpellations and questions of Members of Parliament, the participation of government members in sessions of parliamentary committees, etc. Access to data of public interest is an independent legal institution that assures the transparency of the work of the Government. Under the same heading belongs the institution of the *spokesperson for the Government*, which dates back to the years before the constitutional change of regime. As can be seen from these references, transparency – a complex of legal and institutional components – can best be judged in the context of the rights of the Opposition.

The assertion of transparency, on the other hand, can be assessed from a political aspect. From that angle, transparency is asserted as depending on the political approval, ideals and *interests* of the Government and the ruling parties.

Cabinet, Government Commission, Collegium, Advisory Body, Expert Committee, Government Commissioner

Cabinet, government commission, collegium, advisory body, expert committee and government commissioner – these are bodies and officials appointed by the Government for specific purposes. The scope of this paper does not allow a detailed analysis of their status. We can address two issues in their respect in general terms. The first one is of a constitutional law character: may those bodies and officials act independently *vis-à-vis* organizations outside the gov-

ernment sphere as subjects of public law? The answer is affirmative only in the case of the government commissioner. The activities of the collegia, advisory bodies, etc. are worthy of attention from the viewpoint of transparency of governmental work.

Article 96 of Government Regulation 1088/1994 (20 September) provides that the *government commissioner* acts in the name of the Government and he/she regularly reports to the Government about his or her activities. In the past, government commissioners were appointed for specific periods and with definite territorial jurisdiction in cases of emergency: floods and other natural disasters.[5] By now, however, it has become routine to appoint such officials, which raises several legal and competence-related questions in terms of rule of law. Article 2 of Government Regulation 148/2002 (1 July) mentions additional governmental officials: *government emissaries* and *government representatives,* but it is silent about their powers and status.[6]

The Tasks

(a) The Constitution contains a detailed list of the Government's *tasks*: to protect constitutional order, ensure the fulfilment of laws, direct the work of ministries and other organs placed under its direct supervision, etc. The list ends with a general clause: the Government shall „attend to those responsibilities assigned to its sphere of authority by *law*." (Article 35 [1]) (Author's emphasis)

The intention to provide a detailed description of the Government's competence has its origin in the Communist approach of framing a constitution. We still have the list following the constitutional change of regime, apparently in order to deny some of the earlier provisions. An example could be the provision that the Government may only monitor, whether the local government authorities operate in compliance with the law.

It goes without saying that no list of the Government's tasks can be exhaustive. That is why the list ends with the above-mentioned general clause. According to the classical constitutional approach the tasks of the Government are defined in less specific terms, as for instance: the Government directs the realization of policies that are defined by legislature, directs the implementation of the country's domestic and foreign policy, etc. Underlying the actual wording of the list of tasks is the so-called *residual principle*: a government needs to address all those tasks that the Constitution does not assign to any other organ. A government may never elude responsibility with the excuse that the Constitution did not assign a certain task to its competence. The Constitutional Court possesses guarantees against the abuse of power by the Government, as for instance the right to decide, whether a case belongs to the organs of public administration or

the courts, prior constitutionality review, the constitutional appeal, etc. When the Government acts *ultra vires* in its legislative or other activities to the prejudice of the constitutional competence of another organ or the citizens' freedoms, the Constitutional Court may rectify the situation.

When assessing the Government's relationship to other government agencies or to protect basic freedoms, the Constitutional Court *applied the „residual principle" and/or interpreted the competence of the Government in general terms.*[7]

Let us draw attention to contradictions in the constitutional regulation of the Government's tasks. The so-called residual principle is in contradiction with the general clause that the Government shall „attend to those responsibilities assigned to its sphere of authority by law", because from the residual principle it would logically follow that a government activity does not always need to be attributable to a legislative act. As once Montesquieu, the great oracle of the separation of powers, put it, the Government, the executive power has its „natural limitations." Here and now, those limitations are the competence of other constitutional institutions, the Constitutional Court, which guards constitutionality, etc. The contradiction between the residual principle and the general clause is most conspicuous in the field of legislation. As we will detail it below, according to the law on legislative activities, the Government may issue decrees without separate legal authorization.

(b) When the Constitution and other rules of law define the competence of the Government, they vest the majority of powers in the Government, but actually they mostly depend on decisions of the prime minister. In a similar manner, the powers of the central agencies of public administration mostly depend politically and hierarchy-wise on the ministers. The relationship between the prime minister and the ministers is reminiscent of the relations in a presidential system between the president of the republic and his or her ministers.

Of outstanding prestige are the positions that are entitled to *countersign acts of the president of the republic.*[8]

Decision 48/1991 (26 September) of the Constitutional Court provides that – with the exception of the right of appointment defined by Article 48 of the Constitution (the appointment of top-level judges) – the countersignature of the prime minister or the competent minister is needed, when the president of the republic appoints, promotes, confirms somebody in office or relieves someone. The president of the republic must refuse to grant appointment, if the conditions required by law are not met. Otherwise, refusal by the president of the republic is only constitutional, if the president of the republic has a good reason to suppose that granting approval would gravely endanger the democratic operation of the government machinery.

It would be beyond the scope of this paper to embark on a detailed analysis of the day-to-day exercise of all the powers of the Government. Let us restrict our inquiry to two issues.

Today the institution of countersignature does not cover the *entirety* of relationships between the Government, its members and the president of the republic. There may arise new, yet unregulated constitutional issues relative to powers of the president of the republic, and that may only be exercised with the participation of the prime minister and certain ministers.

Another issue is the *regulation of courts*. In the past, courts were regulated from outside by the minister of justice and from the inside by court presidents, who in turn worked under the supervision of the Ministry of Justice. Under the new law on the operation of courts (*Gerichtsverfassungsgesetz*), the work of the courts is overseen by the National Judiciary Council (Hungarian acronym: OIT), which in turn operates within the organizational framework of courts. The focus of this paper being the status and functions of the Government, we cannot go into details on that question. Let us however mention that, because of the said arrangement, the regulation of courts is no more in the competence of the Government, whose work is supervised by and which is accountable to the National Assembly. In other words, the National Assembly has no oversight of that area any more. When it comes to appropriating the courts' proposed budget for the subsequent year, the president of the Supreme Court (who is also president of OIT) has no other option but to engage in a demeaning bargain, which might shed doubt on the organizational integrity of courts. Furthermore, traditionally, recommendations about the appointment of judges were made with the approval of the minister of justice: the person who made the recommendations, and the minister who countersigned them were accountable for their decisions to the National Assembly. Under the present arrangement it is impossible to ascertain related responsibilities.

How are Decrees Passed?

(a) Some of the issues of the Government's legislative activities are specific (and can only be evaluated within their conceptional system), others are universal (and are ascribable to the general state of legislation).[9]

Today, the Government may issue decrees (apart from the powers it has under extraordinary conditions) on two grounds: as authorized by the National Assembly, or on its own right. As Article 35 (2) of the Constitution puts it: „Within its sphere of authority, the Government shall issue decrees and pass resolutions ... Government decrees and resolutions may not conflict with the law." It is not necessary for each government decree to be attributable to a legislative act.

The way the Government may frame decrees is limited by the National Assembly's general powers. The competence of the two bodies is not delimited. The competence of the National Assembly is „open towards the Government", because it may decide to regulate any aspects of life. True to the above-quoted constitutional provision that government decrees may not conflict with the law, issues that have once been regulated by law will thereafter always belong to the competence of the legislature. Let us now approach the question from another angle. The National Assembly's exclusive competence is defined by the Constitution: these are the *exclusive legislative subject matters.* Yet, the National Assembly may transcend the exclusive powers that the Constitution defines for it. The issues thus regulated by laws – which may be called (non exclusive) *legislative subject matters* – must from then on come under the competence of the legislature. As could be predicted from these premises, the number of subject matters that are regulated by decrees other than those formulated under the National Assembly's authorization has been gradually decreasing. Actually, today there are few decrees that are not issued by the Government under the ad-hoc authorization of the National Assembly.

That state of the formulation of decrees can be attributed to historical circumstances. Before the constitutional change of regime the Presidential Council of the People's Republic (which was a „rival" of the National Assembly in the legislative field) had nearly an unlimited competence to substitute the National Assembly and issue law-decrees. When (after the change of regime) democratic guarantees were put in place in legislative work, and some nostalgia was felt about the classical traditions of Hungarian constitutional arrangements, it was justifiable to restrict the Government's powers to issue decrees. Today, however, such a state of affairs may be questioned on several grounds:

– Hungary is no exception internationally, when it complains about the insufficiency of the law-making capacity of the legislature. The modern constitutional systems have found various responses to the problem. What they have in common is that, when it comes to the number of rules of law passed, for quite some time it has not been a requirement that the legislature should play a dominant role. Concrete formulas may differ but „adherence to a conduct that is worthy of a democratic society" must be maintained.

– After a country accedes to the European Union, the primary role of its *legislature* weakens for several reasons. The Community law rarely differentiates between the institutions of legislation. If a hierarchy between the institutions of legislation appears at all, judicial decisions enjoy primacy. Furthermore, Community law overrules national legislation, irrespective of the source of legislation.

When asking the question, whether greater scope could be granted for legislation by government decrees, it needs to be considered that, *apart from legislative issues that require two-thirds majority, parliamentary legislation has been conducted by the parties in government.* (The expansion of the scope of legislation by decrees would require the amendment of the Constitution; and the enactment of a new law on legislation to replace the obsolete old one would also require the approval of two thirds majority of the National Assembly.) Openness and the scope for debate in the National Assembly differentiate the framing of decrees by the Government from parliamentary law-making. In case the emphasis of legislation is shifted towards the framing of decrees, the related rights of the Opposition need to be reconsidered.

(b) The Constitution provides that the Government has the right to issue decrees. In my opinion, the *present legal arrangement* is a hangover of the Constitution of Communist times. Under Communism Constitutions presuppose a hierarchy between the state organs and emphasize collective decision-making instead of responsibility. When examining theoretical aspects of the framing of decrees by governments, we can find at least two contradictions in the new constitutional system.

> Under classical constitutional law, it is impossible to assert the responsibility of *collegiate bodies* under constitutional law. (The case is different in Hungary today, because interpellations may be tabled both to government members and to the *Government* as a whole.) The validity of that long-standing legal axiom will also depend on the assessment under Community law of tort liability.
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> The coalition government system also contradicts granting greater scope to legislation by government decrees.
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> Let us conclude: as far as the Government's legislation by decrees is concerned, it would be desirable to stress the responsibility of the *prime minister.* That would be justified by general constitutional law and responsibility-related considerations, and by the institution of constructive vote of no confidence, which places the prime minister in the hub of executive power politically and in terms of constitutional law. (Today rules of law issued by the prime minister have the same rank as those issued by ministers.)

The Government and the Executive Power

Traditionally, the executive power subordinated to the Government was considered as unified. With time the functions of public administration became increasingly varied, and the system of ministries even more differentiated. Furthermore, certain functions have been outsourced.

The legislature has retained the right to restrict the action radius of public administration in certain fields, as for instance, national defence. A wide variety of agencies of public administration has sprung up and their bonds to the Government are also diverse. From the viewpoint of constitutional law it is important that the National Assembly should always know which agency of public administration to hold responsible politically and legally for what happens in public administration.

Soon after the constitutional change of regime these issues needed reconsideration. The theoretical questions of the structure of public administration are outside the scope of this paper.[10] We will only examine those subsystems that are defined by the Constitution, namely, the armed forces, the so-called independent agencies created by law, and agencies set up by the Government under Article 40 (3) of the Constitution. (The Government has the right to place any branch of public administration under its direct supervision...)

The functions of the state have been increasing mainly in the fields of research, (electronic) media and sports.[11] As a rule, mixed (that is, public and civil) or exclusively civil organizations are set up to discharge those functions. They are (also) called non-governmental organizations (NGOs). In the Hungarian context it would be more precise though to call them *non-state* organizations. From the aspect of constitutional law, the relationship between NGOs and the state can be problematic as for independence, supply with funds, responsibility for the use of those funds, etc. In addition, there are agencies that are to a certain extent independent from the Government (not the government, the interpretation of which in Hungary is uncertain), as for instance the Central Statistical Office, and the Hungarian Competition Authority. They are undoubtedly „purely" state administration agencies, the relationship of which to the *Government* (the executive power in the strict sense of the term) can be regarded as special from the viewpoint of constitutional law as regards their responsibility.

The Government and Public Administration

(a) The present version of the Hungarian Constitution is taciturn concerning the relation between the Government and public administration:

> – [the Government shall] direct and co-ordinate the work of the Ministries and other organs placed under its direct supervision; [Article 35(1)c)],
>
> – The Government has the right to place any branch of public administration under its direct supervision [...] [Article 40 (3)].

(b) The organs subordinated to the Government usually operate as ministries. The way a ministry is structured, and the functions that are directly subordinated to the minister depend on expectations towards public administration and on aspirations of the government programme.

Division of labour within the government is presently defined by the National Assembly: there is a separate law that lists the ministries of the Republic of Hungary (as provided for by Article 34 of the Constitution). Defining the duties of the ministries is not a direct task of the legislature: the ministers comply with the rules of law and the Government's orders. The ministers without portfolio discharge functions defined by the Government [Article 37 (2) of the Constitution].

Following the change of regime the new pattern of ministries soon reflected the changes that have occurred in the economy: the ministries of the economic branch were dismantled before or during the transition. The volume of public assets dwindled fast because of privatization and reprivatization. A law was adopted to ensure the autonomy of state-owned companies; and the State Holding Company was trusted to handle them. Note that no minister has been appointed to supervise the companies that remained in state ownership, or to direct the agencies that handle privatization.

Ever since 1990 the structure of government was modified, when a new Government was installed. The ministries each overseeing home affairs, finance, defence and education have been exempt to change, but water management, environment, sports, informatics, etc. are now independent ministries, now merged with other areas, now treated as sub-ministry functions. The ebb and flow of domestic politics may justify some of those changes, yet they weaken trust in the law, and occasionally there are professional objections to certain decisions, as for instance, when the environment and water management come under a common ministry.

Division of labour within the government system is a peculiar business. The list of ministries is laid down in a law, which means forming, dismantling and renaming a ministry is in the National Assembly's competence. Changes in the name of ministries involve redeployment of functions, as provided for by Act LXXXVI of 1998 on Changes in the Competence of Ministers. Certain functions of some ministries are specified in a separate law.

When a new Government is installed it might cause some delay that Article 33 (5) of the Constitution provides that „The Government is formed upon the appointment of the Ministers" whereas a minister may only be appointed to head a ministry that is already in operation. Hence, it follows that [in an ideal case] during the process that leads to the installation of a new Government, the leg-

islature must adopt a law on the enumeration of ministries after the election of the prime minister, but before the appointment of ministers. Moreover, the legislature must also be aware of the budgetary changes any modification of the list of ministries might entail.

(c) Government Decree 1040/1992 (5 July) regulates the operation of agencies with national competence. Such agencies are directed by the Government, and each one is supervised by a designated government member.

An agency with national competence is represented in Parliament and during sessions of the Government by the minister charged with its supervision, and that minister helps with the work of the head of that agency. Let us stress, said government decree stipulates that the minister supervises that agency independently from his/her responsibilities of his/her portfolio.

Whatever status the Government accords to the agencies of public administration under its supervision and direction, the government members may not be exempted from the legal and political responsibility for the operation of those agencies of public administration. If that were not the case, the Government could relieve such agencies from their legal and political responsibility to the National Assembly.[12]

It is a sensitive question, whether a minister is ready to respond to interpellations about agencies of public administration that are under his/her supervision. Two related rules of law: Government Decree 2396/1997 (8 December) on the conception and proposed measures concerning the further development of central agencies of public administration other than ministries, and Government Decree 2013/1999 (21 April) amending it, have failed to resolve that problem, because they do lay emphasis on the ministers' responsibility for the central agencies of public administration. (The word „responsibility" does not even occur in those instruments.)

(d) Among the agencies of public administration directly subordinated to Government, special mention has to be made of KEHI, the Government Control Office, which until a few years ago, operated in accordance with Government Decree 61/1999 (21 April), and presently in accordance with Government Decree 70/2004 (15 April), under the aegis of the Cabinet Office.

A detailed description of the said government decree would be out of place here. Suffice it to refer that it defines the competence of KEHI from two directions: from the aspect of public money and from an organizational aspect. Legally speaking, the controlling powers of KEHI do not cover agencies that are not subordinated to the Government. However, functionally KEHI carries out checks on the use of public money in the private sector, more specifically, on how government subsidies are used by various ventures, companies and public foundations.

At present, the powers of KEHI are related to those of the State Audit Office. As KEHI acts „ultra vires" – checks also on entities that are not subordinated to the Government – the question evidently arises, whether the State Audit Office abides by the rules that limit its powers. The question can be further generalized: where are the limits to the interference of public administrative acts in processes of the private sector?

(e) The *annulment of decisions* of agencies of public administration is an important component of the relation between the Government and public administration. There are uncertainties in the related regulation and its theoretical foundations. To put it briefly: according to the classical constitutional principles, executive power – as it operates under the "umbrella" of the Government – is unified and indivisible. The Government's responsibility is unaffected by the fact that the agencies of public administration can be grouped according to „branches of activity" and as being central agencies or county administrative offices. A Government may only fulfil its related responsibilities, if it has the right of disposal over the organs that are subordinated to it. That also involves the Government's right to annul decisions that are either illegal or not purposeful. Under Communism, it was considered an essential instrument of Communist constitutionality that decisions of agencies of public administration that violated the law could be annulled. Since Hungary has been a multi-party democracy, legally irreconcilable decisions (in case they set norms) may be annulled by the Constitutional Court or (in the case of concrete measures) by courts. Consequently, the Government's right to annul legally irreconcilable administrative decisions has become insignificant. However, its right to annul decisions that are not purposeful follows from its responsibility for public administration, otherwise its responsibility for decisions, which do not violate the law could not be asserted. Accordingly, Article 35 (4): "With the exception of legal statutes, the Government shall annul or amend all legally irreconcilable resolutions or measures taken by any subordinate public authorities" is, to say the least, debatable. It is, furthermore, difficult to tell how this constitutional provision relates to those statutes that define by name the interrelationship between the Government and the agencies subordinated to it (as for instance, the armed forces).

(f) The formation of *county administrative offices* – the regional division of the otherwise unified executive power under the guidance of the Government – was a logical consequence of Hungary's transition to a system of local and regional authorities of local government. The detailed regulations about the *köztársasági megbízott* [commissioner of the republic] were first promulgated in Act XC of 1990 on Local Government. The parliamentary debate on the draft of that law caused a major political controversy. The Opposition of that time gave voice to the concern that the commissioner of the republic, even if

his/her functions are purely administrative and professional, will assume a political role, and in such a capacity it will strengthen the Government's position in its tug of war with the local authorities, which were organized on a political basis. The Reasoning of the said law also reflects that concern: „When regulating the legal status of the commissioner of the republic it must be borne in mind that, when defining the outlines of that institution, the framers of the Local Government Act took into consideration both the political and the professional aspects of public administration." Opposition politicians compared the commissioner of the republic to the old lord lieutenant. Even though each commissioner of the republic was put in charge in several counties, opposition fears were not allayed. The opponents of that law referred it to the Constitutional Court, but to no avail.

Later on, the institution of the commissioner of the republic was replaced by the county administrative offices, and this removed the personal touch from that institution.

(g) At first sight, it is clear that the Constitution is silent about public employees and civil service. By contrast, it includes provisions about the personnel of the armed forces and police: „Professional members of the armed forces, the police and other civil national security services may not be members of political parties and may not engage in political activities." [Article 40/B (4)]

Hence, it follows that the Constitution considers public administration first and foremost as an organization. We miss the constitutional requirement that civil servants must be politically neutral, and such a requirement could go further than prohibiting party membership.[13] It could be required that the civil servants should be loyal to the Government of the time; and the Constitution could also require that the civil servants should protect public administration and *public service.*

It goes without saying that rules of law that are lower in the legal hierarchy, than the Constitution include provisions about the protection of public service and the politically neutral conduct of civil servants. As for the latter requirement, Act XXIII of 1993 on the Legal Status of Civil Servants provides that civil servants may not hold office in political parties; and it is a part of their oath of office that they must fulfil their official duties *without bias.* The author of this paper would like to see those requirements being incorporated into the Constitution.

State Secretaries

The institution of *political state secretary* and *administrative state secretary* has direct relevance to the constitutional status of the Government from several aspects. Let us now focus on the differentiation and interconnection of the political and professional aspects of executive power. What was the situation before the constitutional change of regime? The institution of the state secretary was a part of the hierarchy of public administration, where the Council of Ministers stood at the top. A state secretary of ministry – just like the deputy minister – had the right to substitute a minister. The powers of state secretaries, who headed agencies of national competence, were nearly identical with those of ministers. They had the right to issue *orders*.

Act IX of 1989 that modified Act III of 1973 on the Legal Status and Responsibilities of the Members of the Council of Ministers and State Secretaries provides that state secretaries may substitute ministers if, for instance, a minister's mandate expires, until the election of his/her successor. The office of deputy minister was still in use in 1989, and he/she could deputize the minister during sessions of the National Assembly.

Act XXXIII of 1990 on the Temporary Regulation of the Legal Status of State Secretaries heralded a radical change. The law divided the two aspects of executive power. It assigned the office of political state secretary to the realm of politics and granted the right of appointment to the Government. The mandate of the administrative state secretary was defined as indefinite, and he/she was placed to the top of the hierarchy of career civil servants. It is not the purpose of this paper to offer a detailed analysis of that law. The author is content with observing that its main deficiency was that it only placed said offices in a governmental context, but failed to consider the requirements of career civil service. (A law on civil servants and public employees was only enacted in 1992.) Let us add that it would be unfair to blame only the real or assumed deficiencies of that law for the fact that its underlying concept could not be asserted. Whenever there was a change of government, both the political and administrative state secretaries lost their jobs, and even the deputy state secretaries. Ever since 1990, the newly installed governments dismiss the top officeholders of their predecessors with an almost „Marxist-Leninist" zeal, because they blame them with political bias. By doing so, they inadvertently „incriminate" the newly appointed officeholders. This spoils system has become a chronic illness of Hungarian public administration and civil service, because after each change of government accumulated professional experience is wasted. We believe that Governments could compel civil servants to be loyal to them and the spoils system could be abandoned.[14] (Until 2002 administrative state secretaries were entitled to about thirty times their monthly pay in case they were dismissed without a good reason.)

Another aim of Act XXXIII of 1990 on the Legal Status of State Secretaries was to adjust it to the requirements of the newly-born governmental system: the primary duty of the political state secretary is to represent the minister in the National Assembly [Article 3 (1)].

The present rules referring to the members of the Government and state secretaries can be found in Act LXXIX of 1997 (which has been amended several times). Its first version seems to be uncertain in asserting the requirements of parliamentarism, also in connection with state secretaries (which was partly rectified by Act XVII of 2002). A political state secretary may only issue an instruction for the administrative state secretary, when he/she substitutes the minister (in other words, the minister's responsibility remains unchanged); if a minister is unable to attend a meeting of the Government, he/she is substituted by the political state secretary. The law does not empower the administrative state secretary to substitute the minister. It can be ascertained that the relevant provisions of Act XXXIII of 1990 better asserted the requirements of parliamentarism: in case a minister's mandate expired, he/she *could not be* substituted by the political state secretary; during government meetings a minister could be substituted by the prime minister or another minister of his/her choice; a political state secretary could attend government meetings with a voice but no vote [Article 3 (2), Article 4].

Let us have a look at the relationship of the political state secretary and public administration. As it turned out, that office has become involved with the leadership of the work of the ministry concerned. It has strengthened the process that today several political state secretaries may be appointed to the same ministry. The Kjf. stipulates [in Article 18 (2)] that a political state secretary may be given specific assignments, which means that he/she may be appointed to the head of agencies with national competence. From this point of view, I would draw attention to the changes that have occurred in the Cabinet Office. Today the Cabinet Office's functions go beyond ensuring the administrative basis for the work of the prime minister and of the Government. For all intents and purposes it gives an organizational umbrella for the operation of agencies with national competence.

The regulations about *titular state secretaries* have also undergone several modifications. Originally, that office carried additional rank and status, and perhaps tasks separated from the routine of public administration. However, the original version of the Kjf. terminated that office. Act XVII of 2002 then amended the Kjf. and restored it, but defined it as a *position*. The most recent version of the Kjf. (according to Article 31/A) provides that the rules relevant to the administrative state secretary should be applied to the legal status and responsibility of the titular state secretary; the titular state secretary is subordi-

nated directly (without the mediation of an administrative state secretary) to the minister concerned; unless otherwise provided by a law or government decree, he/she exercises employer's rights over organizational units under his/her direction, etc. The question is evident: is the office of titular state secretary a revival of the former state secretary commissioned to head an agency with national competence?

Government Decree 164/2001 (14 September) on the Corps of Senior Civil Servants was (meant to be) a step to consolidate the status of the civil service.

In my opinion it would be justified to reconsider and re-regulate the entire complex of questions related to political, administrative and titular state secretaries in the constitutional context of agencies with national competence and civil service.

National Defence and the Armed Forces

National defence and the armed forces became an area separated from unified organization and activities of executive power early in the classical history of constitutional law. In Hungary, following the constitutional change of regime that process was strengthened by the desire to negate the Communist approach to constitutional issues, and block any Communist attempts at restoration.

(a) The very definition of the *notion of armed forces* was uncertain for a long time. In line with the Communist approach, the category involved all the law-enforcement agencies, the law and order agencies, the frontier guards, etc. The process of differentiation only finished in 2004. Finally, Act CIV of 2004 reclassified the frontier guards. According to the Reasoning of the law, the frontier guards stand closer to the law and order agencies than the armed forces, which guard Hungary's territory against outside attacks. For that reason the law reclassified the frontier guards from a part of the armed forces into a law and order agency. The related chapter heading of the Constitution has also changed. The new heading is *The Hungarian Armed Forces and the Law and Order Agencies.*

The key theoretical question is *who controls the armed forces?* For a long time related questions were referred to civilian control. The need to amend the terminology arose after Hungary acceded to the NATO. The phrase: „civilian control" – which also qualified former career officers to participate in the control of the armed forces – was replaced by the requirement of *democratic control.* The term refers to the various levels of control, the role of the National Assembly and its committees, the organizational set-up of the Ministry of Defence, the role of the state secretaries at that ministry and their relation to the chief of staff and the commander of the armed forces, etc.

As for concrete aspects of regulation, there are two or three neuralgic questions of constitutional law in the relationship between national defence and the armed forces on the one hand and the Government on the other. All of them are rooted in the political and historical situation of the recent past. One such „root" is the stationing of foreign troops in Hungary, and the stationing and deployment of Hungarian troops abroad; another, issuing orders for the armed forces in various situations, including the period of martial law.

The question of who may issue orders for the armed forces was a central dilemma in the course of the constitutional change of regime. In order to remove the armed forces from the *direct* control of the single political party, and to avoid that the armed forces should become an independent political factor, those powers were transferred to the Government. The new type of regulation focused on the National Assembly (where the vote of two thirds of the MPs are required for such decisions), the president of the republic and the Government. Soon after the change of regime the Constitutional Court dropped the president of the republic from the trio of entities that may pass crucial decisions. (The minister of defence's countersignature is needed for the president of the republic to act as the commander in chief of the armed forces, to appoint and promote generals, and to direct the armed forces in peacetime.)

According to Article 40/B (3) of the Constitution, „Within the framework of the Constitution, only Parliament, the President of the Republic, the National Defence Council, the Government and the responsible Minister shall have the right to command the armed forces, unless otherwise provided by international treaties."

The original text of Article 35 (1) of the Constitution provides that the Government supervises the operation of the armed forces, the police and other security organs. The present, revised version uses the terms armed forces, police and law and order agencies. Such phrasing, according to the Constitutional Court, may be interpreted in the way that all the agencies listed belong to the executive power, and the direction of the operation of the armed forces, the police and the law and order agencies encompasses all the directional powers over the armed forces that, in compliance with the laws currently in force, are not expressly vested in the National Assembly and the president of the republic. The armed forces must be organized and kept in the required state under the guidance of the Government.

(b) After Hungary acceded to the NATO, Act CIX of 2003 was enacted, and that meant the modification of the Constitution. Accordingly, Article 40/C (1) of the Constitution provides: „The Government shall have powers to authorize *a)* the use of Hungarian and foreign armed units by decision of the North Atlantic Council, or *b)* the deployment of troops by decision of the North Atlantic

Treaty Organization in accordance with Subparagraph *j)* of Paragraph (3) of Article 19." Said constitutional provision means an exception from Article 19 (3) (j), which vests the National Assembly with the right to deploy the armed forces within or outside the territory of Hungary.

(c) The fact that the Constitution distributes control over the armed forces and the law and order agencies between the National Assembly, the president of the republic and the Government, may be evaluated from various angles. One approach may stress *mutual and equal inspection* that checks and balances are in operation here. Another approach, however, may identify *mutual distrust*. It is not the purpose of this essay to resolve that dilemma. Suffice it to observe that the logic applied here is the same as the one used, when constitutional powers are arranged in connection with the period of state of emergency and martial law. The Speaker of the National Assembly and the president of the Constitutional Court are interspersed as independent actors between said entities.

The regulation of powers amid *extraordinary conditions* (officially called: state of emergency) plays an outstanding role among the traditional governmental powers. There are two neuralgic points here: the decision to introduce and terminate the emergency legal system, and the decision what powers are vested in the Government during the period of emergency legal system.

As mentioned above: the Constitution is well-balanced or identifies mutual distrust – depending on how one regards it – relative to the introduction of the emergency legal system and the assignment of powers in such a period. We have the impression, however, that the regulation tilts towards restricting the room of manoeuvre of the Government.

In a case of emergency, when Hungary is endangered from outside, a National Defence Council plays the central role. When martial law is declared, the president of the republic assumes decisive powers: he/she may introduce extraordinary measures, etc. One might ask, how come that in *such a critical situation* of all situations, it is not the Government that is at the helm? In such situations the burden and responsibility of governance shifts to an „artificially" created body, the National Defence Council and/or the president of the republic, whereas under „normal" conditions, the president of the republic does not participate in governance. Such arrangement is unusual in parliamentary democracies. The principle of checks and balances – or mutual distrust – can be identified also towards the president of the republic. A state of emergency is normally declared by the National Assembly. If it is prevented from doing so, the president of the republic has the right to do so as well. Whether or not the National Assembly is indeed prevented from action, and whether or not the declaration of a state of emergency is justified, must be determined collectively

by the Speaker of the National Assembly, the president of the Constitutional Court and the prime minister. After fifteen years of parliamentary democracy, it can be said that the effort of the framers of the Constitution to ensure checks and balances for periods of state of emergency or martial law between the prime minister, the president of the republic, the Speaker of the National Assembly and the president of the Constitutional Court has proved to be „overkill". Historically speaking, the motivations can be justified: the Constitution was framed in a manner to prevent the Government from turning back the wheels of political history. However justifiable it may be historically, in critical situations all those checks and balances may paralyse the country, and it would be next to impossible to tell who is responsible for what.

In the years after 1989 the Government's role somewhat changed in the power triangle of Government, National Assembly and the president of the republic: distrust in the Government gradually eased, due to the way the situation changed in world politics. Act CII of 1993 (without amending the powers of the National Assembly) *empowered the Government to evade an attack from outside* in case the country's airspace is deliberately violated, there is an unexpected air raid or in case of the intrusion of armed groups. The law provides that the frontier guards need to be made suitable to protect the frontiers even before the declaration of a state of emergency. (The career members of the armed forces, police and the non-military national security agencies are prohibited by law to join political parties.)

Act CIV of 2004 created a new situation by introducing a new category: the *preventive defence situation*. In such a situation – when there is no direct danger of an outside attack, or when Hungary has to fulfil its allied obligations – the necessary measures may be taken, without the restriction of fundamental freedoms. When deciding about the introduction of a preventive defence situation, the National Assembly is free to determine the length of such a qualified period and, simultaneously, *it empowers the Government* to ward the danger off or take measures necessary to fulfil Hungary's allied obligations. Moreover, the law empowers the Government – when the conditions of the preventive defence situation are fulfilled, after it initiated the declaration of a qualified period and until the National Assembly passes its decision –, to take all the measures ensuring that public administration, Hungarian armed forces and law and order agencies can fulfil all the tasks necessitated by the danger threatening the country or required by Hungary's allied obligations. However, on the whole, the regulations referring to the state of emergency and martial law have not been modified over the past fifteen years.

The Local Authorities

In the first year after the constitutional change of regime, the local government authorities were the councils (*tanács*), which Hungary inherited from the previous regime. There was consensus on the need to reorganize them into self-governing local authorities. At closer look, however, the exact notion of self-government was rather hazy at the time. Back in 1989, an opportunity existed that the state-owned enterprises would shift into employee ownership. That is why the autonomous business organizations were also understood as belonging to the notion of self-governments. The law on local and regional self-governments was only adopted after the general elections of 1990. It could be foreseen already in 1989 that the system in which the councils were closely subordinated to the Government would be radically transformed and replaced by autonomous local authorities. The first step in that direction was taken with Act XXXI of 1989. Its Reasoning stated that it would violate the principle of self-government if the Council of Ministers attempted to *direct* the work of the councils. Consequently, that provision was repealed.

In time, the *allocation of financial resources* gained increasing importance in influencing the work of the local authorities.

The Operation of the Government

It is understandable that the Constitution has little to say about the operation and organizational set-up of the Government. The regulation in this case focuses on responsibility, because responsibility absorbs the details of organization and operation. To put it simply, when it comes to the Government, what matters is not *how* decisions are made, but that responsibility for those decisions should be accountable before Parliament. That is why the Constitution leaves it *as a rule* to the Government to define the detailed rules of its organization and operation. (Traditionally, it was only the Parliament that could adopt a legal instrument about itself. It is a theoretical question, whether rules adopted by the Government about its own operation can be considered legal instruments.)

Since the constitutional change of regime every Government has amended the by-laws it inherited from its predecessor, in accordance with the requirements of its platform and coalition arrangement. The regular meeting of *administrative state secretaries*, which precedes meetings of the Government, has been a lasting institution, one that each Government has honoured since 1990. (It would be incompatible with the *methodology* – and the scope – of this paper to consider the question to what degree is the burden and opportunity of governmental work shifted from the Government to the meeting of administrative state secretaries.)

The question may arise, whether there are components of the proceedings of government sessions, the regulation of which would need a legal instrument of a higher rank than a decree. We do not know of any. If such components existed, they should belong to issues that only demand a simple majority of the National Assembly, and it would perhaps only pose a routine task for the government majority after election time. As far as the proceedings of the work of Government are concerned, in our view *transparency* is the prime issue.

The Government and the NGOs

Before the constitutional change of regime, the state organs and those social organizations that were politically active interacted primarily through the Council of Ministers. Take the example of some Communist countries other than Hungary: the highest-ranking trade union official was occasionally a government member as well. Trade unions discharged state functions in Hungary as well, mainly in the field of social insurance and labour safety. In the latter area they had the powers to issue regulations.

Act II of 1989 merged under the same heading all the „social organizations" that had no state functions, and it *terminated the supervision of public administration over them.* It took some time before that law was implemented. A milestone along that road was Act XXVII of 1991, which cancelled the Government's right to examine the legality of certain social organizations.

Following the constitutional change of regime differentiation began among the NGOs *in accordance with their activities* and their legal status. Act CLVI of 1997 on the Public Benefit Organizations provides the legal definition of the umbrella term NGO, which covers *social organizations*, foundations, public foundations, public benefit companies, public bodies and national associations of branches of sports.

The scope of this paper does not allow us to analyse the Government's relation to all those organizations in detail[15]. Let us briefly mention that Act CLVI of 1997 was less rigid in separating the state and social entities than Act II of 1989. On the one hand, the Government (and the ministries) maintain(s) considerable influence on the NGOs by assigning them public functions, retaining the right to establish certain types of NGOs, operating a system of direct government subsidies and defining the criteria according to which certain NGOs may benefit from tax allowances; on the other hand, the Government gladly cooperates with the NGOs and listens to their comments. There are political documents that corroborate that. Over the past fifteen years a lot of things have changed in the sphere of NGOs, yet some of the rules referring to them are hangovers from Communist times. For instance, the way the Constitution

regulates the relationship between state agencies and NGOs is typical of the „old" approach: „In the course of fulfilling its responsibilities, the Government shall co-operate with the relevant social organizations." (Article 36) The Constitutional Court has interpreted this provision as a „recommendation on methodology for the Government."

Article 27 of Act XI of 1987 on the Legislative Process provides that the NGOs and interest associations concerned have the right to formulate an opinion about the bills that are submitted to Government. Decision 10/1991 (5 June) of the Constitutional Court stipulates that the omission to obtain the opinion of the organizations concerned does not render a statute unconstitutional. The Constitutional Court later modified that position in Decision 30/2000 (11 October) stating that the organizations (some of which have the right of refusal, others the right of comment) that are specifically named by rules of law [not just by Act XI of 1987 – *author's comment*] must be seen as part of the executive power, and therefore the framers of statutes must consider their comments.

The relationship to the *trade unions* has remained a separate complex of issues. The Government has the duty to coordinate its policies with Hungary's about a hundred trade unions. Act XLVII of 2002 provides that the National Interest Reconciliation Council will take over the functions of the National Labour Council.

In some modern Western democracies interest associations – including trade unions – have both the functions of safeguarding interests and carrying out political activities. As an example, we can mention the French *Conseil économique et social* (CES), which rallies, among other entities, trade unions. Until a similar situation arises in Hungary, the Government will play an outstanding role in fostering relations with the trade unions.

The Government's Role since Hungary has Acceded to the EU

Hungary's accession to the European Union has brought an epochal change in Hungarian constitutional law, and it has a fundamental impact on the Government's constitutional status.

Act LXI of 2002 amended the Constitution by inserting the so-called EU clause and sought to rectify certain constitutional inconsistencies that were to arise in the wake of Hungary's EU membership. Article 6 of that law provides (augmenting Article 35 of the Constitution) that „the Government shall represent the Republic of Hungary in the institutions of the European Union that require government participation." Article 35/A (1) states: „In all matters in connection with European integration, the detailed rules governing the oversight powers of

Parliament or its committees, the relationship between Parliament and the Government, and the Government's obligation to disclose information shall be enacted by a two-thirds vote of those Members of Parliament present." Article 35/A (2): „The Government shall present to Parliament the motions that are on the agenda of the decision-making mechanism of those institutions of the European Union that require government participation." In other words, said amendments of the Constitution authorize the National Assembly – in connection with affairs related to European integration – to formulate laws on the rules of the *oversight competences of parliamentary committees*, *problem reconciliation* between the National Assembly and the Government, and the *information obligations* of the Government. In fact, the amendment of the Constitution does not authorize the legislator to amend the constitutional provisions that relate to broadly interpreted governmental powers and related procedural rules. Technically speaking, that should have been stipulated by the amended Constitution.

However, Act LIII of 2004 on the Cooperation of the National Assembly and the Government on EU Affairs (Hungarian acronym: OKtv.), which was enacted following said constitutional authorization, does not follow the constitutional authorization in every detail. Its Preamble includes the key words of the relevant constitutional provisions: oversight, problem reconciliation and information obligations in connection with EU affairs, however (to tell it in non-technical language), it cancels the procedural rules that are defined in the Constitution. In other words, the OKtv. overrules the Constitution.

Let us have a closer look at that. According to the OKtv., right after receiving it, the Government has to send to the National Assembly every draft of European Union legislation, recommendation and document that plays a role in the decision-making processes of those EU organs that operate with the participation of national governments.

However, the OKtv. obliges the Government to discuss with the National Assembly themes that have *significant constitutional importance*: affairs that need a qualified majority, the definition of fundamental rights and duties, provisions that are in contradiction (!) with the laws in force (Article 2). As far as said themes – and other themes – are concerned, the Government puts forward its *draft position*, and the National Assembly may adopt a *position*. In that position the National Assembly identifies the viewpoints, which it intends to assert in the course of the decision-making process, related to EU-related affairs. [Article 4 (1), (2)]

In other words, the National Assembly „responds" to the Government's draft position on issues of key importance with a position.

However, the question evidently arises: to what legal category will such a position of the National Assembly belong? To what extent will such a position oblige the Government to do something? Our short answer is: to no extent. Let us see a more detailed answer, one that is based on the text of the law concerned.

The Government formulates the position that it intends to represent during an EU-related decision-making process after considering the National Assembly's position ... If the matter concerned requires a two-thirds majority of the MPs, the Government may only divert from the National Assembly's position in justified cases. [Article 4 (4), (5)] However, during the European Union's decision-making process the Government may modify that original position, about which the National Assembly formulated its response – true, the Government has continuously to inform the National Assembly about the state of affairs, and the National Assembly may also modify its (original) position during the process.

To paraphrase those provisions: the European Union decisions, which are formulated with the participation of the Government's representative, may overrule the Constitution without guarantees, antecedents or consequences.

That part of the OKtv., which speaks of another procedure than the routine procedure of problem reconciliation between the Government and the National Assembly, is constitutionally the most problematic part. [Article 4 (6)] In case the National Assembly fails to adopt a stance about the Government's position by the time limit required by the EU decision-making process, the Government may pass its decision on the position to be represented in its absence. In such cases the Government's opportunities are almost unlimited. That is only *mitigated* by the fact that after the EU's institutions that operate with governmental participation have adopted their decisions, the Government gives oral explanation to the National Assembly, if the position it represented diverts from the National Assembly's position. In case the difference between the two institutions touches on a theme, the regulation of which under the Constitution requires a decision with a qualified majority, then the National Assembly must pass a decision about the *adoption of the explanation (!).* [Article 6 (2)]

We have come full circle: the Government's position, which it represented contrary to how the National Assembly responded to the Government's draft position, and which the Government „sealed" with its vote in the European Union's institutions, is final and cannot be modified. *The National Assembly may only decide, whether to agree with the Government's explanation about the position the Government represented.*

According to the OKtv., it is impossible to question the effect and validity of the EU decision that has been made with the participation of a minister. As far as responsibility is concerned, the position the prime minister or a minister has taken as a member of the Council of the European Union, the National Assembly may only evaluate it in terms of general political and legal responsibility.

In that connection, the contradiction can be increased almost to the absurd: concerning certain subjects, the Council may by a majority vote reject a recommendation that was put forward by the prime ministers of some of the Member States. Projected back to the Hungarian constitutional conditions, such a scenario means that the prime minister or a minister has to assume political responsibility before the National Assembly for a decision with which he/she himself/herself did not originally agree, and even voted against it in the Council of the European Union.

Overall, we can state that the OKtv. cannot resolve the important contradiction that appears between the urgency of decisions on EU-related matters, and the democratic guarantees demanded by the domestic law of the country concerned. On a deeper, philosophical level, we are talking about a fundamental question of the operation of the European Union. It was clear for the „Founding Fathers" of the European Community right from the beginning that a consensual decision-making process between multi-party parliaments of the Member States could stymie the operation of the Community. It has to be borne in mind that, as far as European Union affairs are concerned, the relationship between the legislature and the executive power is regulated along similar principles in other Member States of the European Union as well. The domestic proceedings of exercising the Government's EU-related powers may not be allowed to question the primacy of Community law under any condition. However, from the standpoint of Hungarian constitutionality, the present state of affairs is hardly tenable. A mutually acceptable compromise formula needs to be found that satisfies both the requirements of the European Union and the Hungarian Constitution.

NOTES

[1] The author of this paper was a university student when the following episode happened. A secretary of the Presidential Council of the People's Republic presented a paper at a conference. He spoke of the circumstances under which a law-decree on the awarding of decorations had been adopted a short time before. The Presidential Council, he said, modified the recommendation that had been submitted to it by the Council of Ministers: the medal that accompanies the highest decoration should be made of gold instead of copper. The modification was expected to increase costs by the price of a wedding ring. The secretary of the Presidential Council told the conference that a short time after the modification was made, a deputy chairperson of the Council of Ministers indignantly rejected the modification.

[2] A paper that analyses the constitutional status of the Government faces the following dilemma: its activities touch on nearly every aspect of the state's institutional system. We cannot be silent about the various ramifications of the issues concerned, yet the scope of this paper prohibits going into details. That is why the reader will too often see the phrase: a detailed discussion would go beyond the scope of this paper.

[3] Even though the relevant provisions of the law dating back to 1848 were in force, and there were voices calling for their application, they were never applied. Those, who were called to account for war crimes and crimes against the Hungarian people under Decree 81/1945 of the Provisional Government, and were formerly members of the Government, declared that their cases should be referred to a council of deliberations consisting of Members of Parliament instead of the so-called people's court. *See*: Tibor Lukács: *A magyar népbírósági jog és a népbíróságok (1954-1950)* [The Law Applied by the People's Courts], Budapest, 1979, p. 395. In the case of Ferenc Rajniss (who was a minister in the Government of Ferenc Szálasi from October 1944), the National Council of People's Courts (Hungarian acronym: NOT) rejected that argument by stating that Szálasi took power by force, so the continuity of law was broken. Consequently, the defendant cannot be considered a minister appointed in a constitutional manner, who could request a special treatment with reference to any other crimes by invoking Act III of 1848. Lukács, op. cit. pp. 397-398. As for Béla Imrédy and László Bárdossy, who had been ministers before 19 March 1944, the NOT considered Decree 81/1945 applicable, because it was seen as a special source of law by comparison to Act III of 1848. „In what capacity the defendants committed the war crimes and crimes against the people is irrelevant."
There is no evidence showing that the court that tried Imre Nagy (who was appointed prime minister during the Revolution of 1956) and some of his ministers, ever considered applying Act III of 1848.

[4] As both the German and Hungarian systems are based on the principle of constructive vote of no confidence, a comparison can be most enlightening. „In Germany the Chancellor and the ministers have individual responsibility. The Federal Government as a body is not responsible to the Parliament. ... The relationship between the ministers and the Chancellor differs from what is customary in public administration...The responsibility the members of the Government have towards the Chancellor, differs from the disciplinary responsibility of civil servants. Article 8 of the law on federal ministers *explicitly prohibits the application of that law to federal ministers* (*author's italics*). József Hargitai: „A jog és politika határvonalán. (Gondolatok a miniszteri felelősségről)" [On the Borderline of Law and Politics. Thoughts about Ministerial Responsibility], *Magyar Közigazgatás*, vol. 5, 1995, p. 279.

[5] *See* Zoltán Bánsági: A kormánybiztos jogállásáról [About the Legal Status of Government Comissioners], manuscript.

[6] Professor Tamás Sárközy, government commissioner for a reform of the governmental system, published a brief, preliminary summary of his comprehensive survey of the organizational set-up, cost management, etc. of government, while the author was writing the Hungarian original of this paper. Though the present paper only examines the government in the context of constitutional law, there is considerable overlapping in the findings of the two surveys. The summary of Sárközy's report includes dramatic observations: „...whether regarded from the inside or the outside, the network of ministries is in a state of disintegration ... the political decay of ministries needs to be halted ... the work of ministries should be carried out by the civil servants working at the ministries ... the state should see to the realization of state tasks and the satisfaction of public needs mainly through the agencies financed from the central budget ... the unhealthy mixing up of the spending of public money and entrepreneurial activities should be stopped ..." When it comes to legal issues that are discussed in this paper, Sárközy is severely critical: „The fact that there are fast-changing

central agencies of public administration (other than ministries), and a legion of ministers without portfolio, political state secretaries at the Cabinet Office, government commissioners, government emissaries and government representatives, it means that certain powers of the traditional ministries are suspended and/or certain powers are duplicated." *See* Tamás Sárközy: „A Way Out from the State Labyrinth", *Népszabadság*, 5 March 2005.

[7] For details, *see*: András Holló: „Az Alkotmánybíróság tizenöt éve" [Fifteen Years in the Work of the Constitutional Court], *Magyar Közigazgatás*, October 2004 p. 596. – About the activities of the government *see also* József Petrétei: „Kormányzás és kormányzati rendszer" [Government and Governmental System] in: *Válogatott fejezetek a rendszeres alkotmánytan köréből* [Selected Essays on Constitutional Studies], ed. László Kiss, Pécs, 1996; László Sólyom: *Az alkotmánybíráskodás kezdetei Magyarországon* [The Early History of Constitutional Courts in Hungary], Osiris, Budapest, 2001, p. 734; Zsolt Balogh-András Holló-István Kukorelli-János Sári: *Az alkotmány magyarázata* [An Interpretation of the Constitution], Budapest, KJK KERSZÖV, p. 449.

[8] On the early history of the relationship of the president of the republic and the Government *see* István Kukorelli: „The Government and the President of the Republic" in: *Balance. The Hungarian Government 1990-1994*], Korridor, 1994, pp. 97-116.

[9] On theoretical questions and certain developments of the framing of decrees *see* „The Government and Legislation by Decree" in: *Balance. The Hungarian Government 1990-1994*, Korridor, 1994, pp. 144-161.

[10] For a review of related issues *see* István Balázs: „A központi közigazgatás különös hatáskörű szerveinek szabályozási koncepciója" [Regulation Conception of Specialized Central Agencies of Public Administration], *Magyar Közigazgatás*, September 2004, pp. 513-528.

[11] *See* „A tudományos forradalom hatása az államszervezet fejlődésére [The Impact of Scientific Revolution on the Development of the State Machinery], *Állam és Igazgatás*, November 1968; Gábor Teimer: *A kormányzattól független szervezetek beillesztése a magyar államszervezetbe a tudományban, médiában és a sportban* [How Agencies Independent of the Government Adjust to the Hungarian State Machinery in Science, Media and Sports], EU-Studies, vol. 4, National Development Office, Budapest, 2004, pp. 597-636.

[12] As for the conditions under which the agencies of public administration other than ministries operate, *see* Imre Verebélyi: „A nem minisztériumi jogállású központi közigazgatási szervek reformja" [Reform of Central Agencies of Public Administration], *Magyar Közigazgatás*, December 1997, pp. 705-712. For a report about research on the relationship between the Government and public administration during the 1990s, *see* Imre Verebélyi: „A kormányzás és közigazgatás reformjának tervezete" [Draft of the Reform of Governance and Public Administration], *Magyar Közigazgatás*, April 1996, pp. 193-229.

[13] On the neutrality of public administration *see* István György: „Közszolgálat és politikai semlegesség ma Magyarországon" [Public Service and Political Neutrality in Hungary Today] in: *A demokrácia intézményrendszere Magyarországon* [The Institutional System of Democracy in Hungary], Hungarian Academy of Sciences, Budapest, 1997. Lajos Lőrincz: „A független és semleges közszolgálat lehetőségei Magyarországon: eredmények, hiányosságok, perspektívák" [Potentials of an Independent and Neutral Civil Service in Hungary: Achievements, Deficiencies and Perspectives], *Társadalomkutatás*, nos. 1-2, 1997.

[14] *See* previous note.

[15] *See* Ágnes Simkó Sári: *A kormányzat és a civil szervezetek kapcsolatának korszerű lehetőségei* [Modern Potentials in the Relationship between the Government and the NGOs], Papers on the EU, vol. 4, National Development Office, Budapest, 2004, pp. 561-596.

SUMMARY

Changes in the Constitutional Status of the Government since the Change of Regime (From „Our Party and Government" to the European Union)

JÁNOS SÁRI

The essay examines how the constitutional status of the Hungarian Government evolved during the one and a half decades after the political changes of 1990. The most important change was that the Government was made responsible to the Hungarian National Assembly (1989), and the constructive vote of no confidence was introduced (1990). As time went by, the requirements of Western constitutions were gradually asserted in various aspects of the Government's organization, operation, its relation to public administration and local governmental authorities. That process was somewhat disrupted by the adoption of Act LXXIX on the Legal Status and Responsibility of Ministers, which for practical purposes implemented civil servant responsibilities for ministers. Some of the laws that did not comply with the Constitution were later partly annulled by the Constitutional Court. After Hungary acceded to the European Union, further changes attracted attention. Act LIII of 2004 on the Cooperation of the National Assembly and the Government on EU Affairs cancels certain procedural rules that are defined in the Constitution, which in effect means that the law concerned overrules the Constitution.

RESÜMEE

Entwicklung der verfassungsmäßigen Situation der Regierung nach dem Systemwechsel (von 'unserer Partei und Regierung' bis zur Europäischen Union)

JÁNOS SÁRI

Die Studie gibt einen Überblick über die verfassungsmäßige Situation der ungarischen Regierung in den seit dem Systemwechsel vergangenen 15 Jahren. Die Änderungen von größter Tragweite waren einerseits die Schaffung der Verantwortung gegenüber dem Parlament (Landesversammlung), andererseits der Übergang zum System des konstruktiven Misstrauensvotums in den Jahren 1989 bzw. 1990. Danach wurden an verschiedenen Punkten des Aufbaus der Regierung, der Funktion im Verhältnis zur Verwaltung und zu den Gemeinden usw. die Bedingungen der klassischen Verfassungsmäßigkeit stufenweise erfüllt. Dieser Prozess wurde durch das Gesetz Nr. LXXIX vom Jahre 1997 über die ministerielle Verantwortung gewissermaßen unterbrochen, da es im wesentlichen die Verantwortlichkeitsprinzipien des Beamtentums in der Regierung zur Geltung brachte. Diese, nicht einmal der Verfassung entsprechenden Regeln wurden vom Verfassungsgericht teilweise für nichtig erklärt. Die neueste Änderung hinsichtlich der Zuständigkeiten der Regierung wurde wegen des Beitritts zur Europäischen Union notwendig. Das Gesetz Nr. LIII vom Jahre 2004 über die Kooperation des Parlaments mit der Regierung in Angelegenheiten bezüglich der Union hebt – im Allgemeinen – diejenigen Schranken, Kompetenz- und Verfahrensregeln in Unionssachen auf, welche die Verfassung für diese Sachen gemäß ihrer Natur, und aufgrund ihrer verfassungsmäßigen Bedeutung feststellt.

HUNGARY BETWEEN THE LAST ELECTIONS AND THE NEW GOVERNMENT (2002-2004)

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Hungary's EU-accession was a great achievement. As a result of their capacity to establish a functioning market economy and a democratic political system, the new Eastern European member states have finally been fully accepted by Western democracies. But Hungary still has to develop its own EU-strategy and assert its profile within the new European space. As the war on Iraq and the tensions between the US and some EU member states have shown, this will be a constant challenge for the elites and their managerial and integrative capacity. EU-membership will also influence the country's future economic and political performance and sustain its further democratic consolidation.

Unlike the first social-liberal government (1994-1998), the present coalition was not able to uphold Hungary's leading role within the Eastern European transition countries in economic performance. Hungary does not stand out as it did in the mid 1990s, when it attracted the largest share (per capita) of the Western foreign direct investment in the whole region and served as a model for successful economic and fiscal policy supporting stable growth. On the one hand, some competitors – like the Baltic States and Slovenia – have improved greatly; on the other hand, Fidesz's populist economic and welfare turn in government (1998-2002) at the end of the 1990s was not decisively corrected by the succeeding Medgyessy government (2002-2004). The Hungarian economy still has to recover from Fidesz's populism, and the competitiveness and growth orientation has to be fostered. Moreover, the new Gyurcsány government (2004 pp.) has not had enough time in office to master the task.

Despite Fidesz's polarizing effects, Hungary remained a stable parliamentary democracy. However, the failed citizenship referendum in December 2004 and Fidesz's populist nationalistic campaign divided the Hungarian society along the political Left-Right-cleavage. While the social-liberal government is trying to reunite the Hungarian society on the basis of a European, republican, and civic identity, the biggest oppositional party, Fidesz has moved towards Euroscepticism and has been increasingly appealing to the Hungarians' national identity and nationalistic instincts. Its populist-protectionist welfare and economic concepts enjoy great support by the wider population.

The European, republican and civil society orientation of both social-liberal governments has restored the coalition parties' co-operation within the domestic and foreign policy arenas. However, there remain problems which are not likely to be solved within a short term period: improving the Roma's situation, fighting corruption, decentralizing and regionalizing the institutional structures according to the subsidiarity principle, reorganizing the healthcare and educational system, raising economic competitiveness and growth, strengthening political unity and providing social inclusion, ensuring the future by investing in environment and education, as well as integrating the ethnic Hungarian communities abroad into the new European space. Both governments have tried their best, but the results of the first were not fully convincing and the second just came into office in September 2004.

I. History and characteristics of transformation

Hungary's transition to democracy took place after forty years of communist rule. Unlike its neighbours, Hungary „liberalized" its single-party socialist rule relatively early, after a period of Stalinist totalitarianism that followed the 1956 uprising. As early as the late 1960s, a more consumer-based communist economic system began to emerge under the leadership of the Kádár regime. By not politicizing all spheres of social life and by partially liberalizing private, economic, and social life, Hungary experienced a period of social calm, growing consent, and dynamism in the „second economy" in the 1970s in what became known as „Goulash Communism".

However, the rising standard of living – the communist leadership's primary legitimizing factor – was short-lived. The lack of industrial output had to be compensated by extensive borrowing from the West, which meant increasing external debt. By 1982, Hungary already owed some $9 billion to foreign creditors. At the end of the 1980s, Hungary's „socialist market economy" had accumulated external debts of around $20 billion. This was the price Hungary paid for opening its economy so early. But the early opening not only laid the microeconomic foundations for competitiveness, it also prepared significant parts of the Hungarian population for the demands of transformation.

The democratic transition was initiated by reformed communist elites. Against the backdrop of political change in Moscow and the desolate economic situation at home, these forces were prepared to allow at least a limited degree of liberalization and pluralization in the political arena. János Kádár, who had been the leader of the Communist Party since 1956, was ousted in the spring of 1988 and replaced by the Communist reformers Károly Grósz and Miklós Né-

meth. Accelerated political and economic reforms strengthened opposition to the regime and ultimately led to the abandonment of the single-party system. In 1989, Round Table discussions were established following the Polish example. They were supposed to fundamentally change the political system and its constitution, but given the prevailing circumstances – a demobilized and apolitical society – the talks had an exclusive character and resulted in a compromise negotiated by the elites. The compromise consisted of the agreement to hold free elections in 1990 and to initiate the necessary constitutional amendments. The process of changing the system in Hungary was largely run from above by old regime elites.

In the years that followed, Hungary was able to establish a democratic political system that was cemented by several successive democratic governments. The administrative system was decentralized and made more effective. Local self-administration was established as early as 1990. Democratic transformation brought with it the change of the economic system. The democratically elected governments of the 1990s privatized state-owned companies, liberalized foreign trade, and helped increase the privately held share of all productive property from 35.2% (1992) to 72% (1997). During the same period, industrial relations were reformed in Hungary; free trade unions were established, as were employer and trade associations. Different platforms, such as the „tripartite" committees, were established to coordinate and integrate interest groups into a stable cooperative neo-corporatist framework including the government. Democratic transition and economic transformation spurred economic growth, which increased greatly from 1996 onward.

II. Assessment

1. Democracy

1.1. Stateness

There were no problems on the level of the territorial integrity and the legitimacy of state power in Hungary, which could endanger the consolidation of democracy. Hungary has an active policy on protecting national minorities within the country and the Hungarian minority in the neighbouring countries. Hungary fully implemented the minority protection articles of the EU Constitution. However, the minority policies for Hungarian communities abroad have at times provoked neighbouring states. With millions of ethnic Hungarians living as Ukrainian, Slovak, Rumanian, Croatian, and Serbian citizens, the issue has not yet been completely solved. Both social-liberal governments rejected the attempts of the centre-right opposition led by Fidesz (after 2002) to

establish Hungarian citizenship for the ethnic communities in the neighbouring countries. The referendum on this matter, held on December 5, 2004, did not reach the constitutionally required quorum.

Church and state are clearly separated; politics and policy making are secularized. The Gyurcsány government criticized the Catholic Church for its political interventions during the citizenship referendum campaign in 2004.

Decentralisation and regionalization are not on the agenda of the present government, and the reforms of the former Medgyessy cabinet have not been implemented yet. Europeanization has strengthened central authorities and disillusioned expectations towards further decentralization and regionalisation.

1.2. Political participation

In Hungary, there is a general active and passive voting right. Despite accusations of the Centre-Right, international observers and national authorities did not register any serious distortions during the 2002 elections and the 2004 referendum. Electoral participation reached its peak in the 2002 elections (70%) but has declined steadily since: it dropped to approximately 65% in the 2003 EU-referendum, plummeting to 38.5% in the EU-elections and to 37.5% in the referendum on citizenship and privatization in healthcare. This "double" referendum did not reach the constitutionally required quorum, and its results were therefore not considered valid.

The social-liberal governments – elected in 2002 and reorganized in 2004 – enjoyed full authority during their terms. There were no veto powers such as the Church, the security apparatus, or the military. Both governments respected human rights and the freedom of speech.

In Hungary, trade unions represent about one third of employees. The social-liberal governments have made some attempts to re-strengthen the trade union's rights after the Fidesz government, but their austerity policies have raised hostilities in the trade unions of the endangered branches. There are more than 60,000 NGOs registered in Hungary. The social-liberal governments have resolutely tried to establish a partnership with civil society by means of generous financial aid and, to a certain extent, inclusion of NGOs into policy implementation, especially in the areas of environmental and social policy, women, and migration.

The opposition has been pointing at imbalances in the media policy since it lost the elections in 2002, but social-liberal policies do not pose any serious threat to the media.

1.3. The rule of law

In Hungary, there is a well established system of „checks and balances". Although the social-liberal governments upheld this system, like their predecessor – the Orbán government (Fidesz) – they continued to the government's and the Prime Minister's authority. In fact, the Prime Minister's office became the effective centre of government during the Orbán era (1998-2002); this was upheld and even extended by the socialist governments. While the new Prime Minister Gyurcsány has been able to extend his authority to give general orders instead of the government, his Liberal Minister of Education's higher education reform bill was declared unconstitutional by the Constitutional Court in December 2004, because – instead of a parliamentary law – a ministerial order had been used to regulate the citizens' basic rights and duties.

The Constitutional Court and, to a certain extent, the President's Office are functioning as judicial reviewers, e.g. as early-warning systems against the legislation initiated by the government and passed by the social-liberal dominated Parliament. This is due to the fact that the President of the Republic has the right to send bills back to Parliament to modify them. The Gyurcsány government's former Minister of Justice stepped down when he saw his concept and policy of judicial and administrative reform endangered by the government's austerity policy. Other persistent problems are the judiciary's fiscal dependence from government and the blockade of the re-election of judges for the Constitutional Court by the political parties, whose candidates have not been able to obtain the required two-third majority so far. By the end of 2004, this distorted the rulings of the Constitutional Court seriously. Despite all of this and the conflict between the chief attorney and the social-liberal coalition, the functioning of the courts and the judicial system itself are not endangered, and the rule of law is guaranteed.

Despite the social-liberal governments' promises to fight corruption, no effective measures were taken for this purpose (see 3.3).

Although Roma rights are generally being defended, control mechanisms are missing, and NGOs report serious violations against the Roma, drug-dependents, prostitutes, and migrants as well as against petty criminals.

The Constitution guarantees equal treatment and opportunities for all Hungarian citizens. The social-liberal governments have made considerable efforts to better include neglected groups. To ensure equal rights for women, the handicapped, the Roma, and others, an EU-oriented comprehensive reform was initiated and a special governmental agency for equal rights – connected both to welfare policy and to human rights policy – founded. However, this agency's financing, political prestige, and administrative power has not yet been clari-

fied. This has led to a rapid change of its administrative and legal status, including the personal replacement of its leader. The aim of equal opportunity legislation and action, nonetheless, brings Hungary closer to EU-standards. The Roma issue is politically handled with care and within the framework of the EU minority policy concept. However, discrimination of the Roma in the Hungarian society and in some local branches of the public administration has not fully disappeared.

Anti-discrimination law has caused heated discussions among the political parties. A law was passed and should be enacted January 2005, but it is under judicial review by the Constitutional Court. If parts of it are declared invalid, this may endanger its implementation by a central programme and authority as planned by the government.

1.4. Institutional stability

In Hungary, there are stable institutions that by and large guarantee democracy and the rule of law. The central organ of the parliamentary democracy is Parliament itself. However, the strong polarization between the Left and the Right is hindering consensus building. The parliamentary debates are rhetorical and ideological; policy orientation and argumentation occurs only in the committees. Opportunities for a general consensus such as the EU-referendum, the EU-accession, the EU-elections, or even the referendum on citizenship were missed. It has proved impossible to establish a pragmatic national interest or public cause beyond the interests of the political camps.

The government and the Prime Minister are further cumulating power. The top-down bureaucratic-elitist approach, which already marked the Centre-Right government (1998-2002), has also characterized the Leftist governments since 2002.

The administration is relatively efficient, although even on the central level the tasks for the EU-accession were sometimes overloading and led to administrative mismanagements and political rivalries. The former government's deficits on the regional and local level persist and have to be readdressed according to the EU-norms.

There is an independent judiciary with a working self-administration. The introduction of a new judiciary organization is making slow progress. This is in part due to the large institutional challenge of EU-accession and its administrative lag, but also due to a lack of resources and financial support, as the retreat of the Minister of Justice in the autumn of 2004 clearly shows. The slow-down of the judiciary reform is blocking further enhancement of a more effective judicial system.

There can be no doubt: Fifteen years after the transition no relevant veto actor challenges the legitimacy of the democratic institutions.

1.5. Political and social integration

The Hungarian party system is rather stable and there have not been any effective newcomers since 1989. There is a tendency towards a certain Left-Right polarization with a corresponding block building, but the level of an effective two-party system has not yet been reached. The Left is led by HSP, the Right by Fidesz, and in both blocks there are still efficient allies like SZDSZ (the Liberals) for HSP and MDF for Fidesz. However, Viktor Orbán has been trying to build party unity on the Right. This led to the annihilation of the Smallholder party, its former coalition partner during the last government. It also endangered MDF's existence as an integrated political party in the autumn of 2004, because the faction in favour of independence from Fidesz – led by Ibolya Dávid – and the pro-Fidesz faction almost broke the party's unity.

The Communists were not able to gain any influence on the national level, except for their initiative for the referendum on the privatization plans of the „Third Way" Gyurcsány government, which Fidesz effectively supported. Small groups and networks of Right–wing radicals have been articulating provocative but non-violent protest; this mobilized left counter-movements in 2004. However, these mobilizations at the fringes of the political spectrum do not destabilize the Hungarian democracy.

The 2002 elections polarized Hungarian society, and the new Fidesz opposition has adopted a steady escalation strategy against the social-liberal government. It even accuses former allies like Ibolya Dávid – MDF's Minister of Justice in the former Orbán government – of being allies of the „Communists". While Fidesz was very critical towards the EU-referendum and framed EU-accession as a danger for the country's national interests, MDF was in favour of the EU-accession. Fidesz recently defended citizenship for all ethnic Hungarians living in foreign countries, which was successfully initiated as a referendum by a politically isolated NGO. After the referendum's failure, they denounced the government parties and the people who voted „no" or abstained as „aliens" to the nation.

While Fidesz is clearly trying to polarize a generally apolitical, passive, and welfare oriented public, HSP and SZDSZ stress the ideas of a social democratic „Third Way" and try to reunite the public with the ideas of Europe, modernity, and democracy based on a „republican", „civic" identity. Although the opposition role has enhanced Fidesz's populism popular mobilizations by its political action committees remain an exception. The social-liberal coalition's replacement of Prime Minister Medgyessy by Gyurcsány can be classified as

the selection of an efficient leader for the Left as opposed to the Right's charismatic leader Viktor Orbán. Gyurcsány as well as Medgyessy are among the richest people in Hungary and they both were part of the former nomenclature.

Hungary is a party democracy. The Churches are politically inactive, although they supported the „yes"-option in the referendum on citizenship; this was criticized by Prime Minister Gyurcsány. Trade unions are politically weak. Popular initiatives such as referendums are ineffective if they are not supported by political parties. Regions and regionalism are weak to non-existent. Except for the Roma, ethnic minorities are not numerous. The Roma have a predominantly parochial and passive political behaviour that prevents them from mobilization or establishing an own political identity.

After the polarised 2002 elections, political participation as well as the satisfaction with political elites and institutions has considerably weakened. In combination with the declining economic situation and the social liberal government's austerity policies, this has led to a further deepening of Euro-scepticism and other negative attitudes towards the EU. A considerable part of the lower educated Hungarian population associates EU-membership with endangered welfare standards and therefore regards the EU less and less as a stabilizing and enriching partner. Concerning the new EU-institutions, political alienation is the general attitude in the population. However, a distinction should be made between educated and less educated groups, between generations, as well as between regions. Urbanized areas, first and foremost the city of Budapest, are the decisive areas for political mobilization, while the farm districts and villages with Roma population in the East and South are the least mobilized areas in the Hungarian society. The elites, urban middle classes, and the better educated people mostly support EU-membership.

Civil society focuses on welfare and culture and does not exercise political „watchdog" functions. The participation of NGOs in policy implementation has been strengthened by new government measures and EU-programmes. The groups engaged in civil society are mostly Socialist and Liberal oriented, while the nationalistic oriented groups would rather participate in Fidesz's protest campaigns and political action committees. Despite being the targets of both social-liberal governments' inclusion and anti-discrimination programmes as well as of several EU-programmes, the Roma, women, and the youth do not have any distinct culture of political activism.

2. Market economy

2.1. Level of socioeconomic development

According to international surveys, Hungary is performing well among the new EU-members. Income differences are not high and the level of education is high. There is no systematic exclusion of women from the labour market. According to international surveys, poverty is not particularly high. However, these figures are based on aggregated macro-data and hide the rather divided picture that characterizes Hungarian society. Many of the Roma are living under the poverty line. With the East and the South still struggling for development, there are also considerable regional disparities.

2.2. Organization of the market and competition

The basic principles of market-based competition have been established in Hungary and the economy is based on the rule of law. Many national regulations were abolished and new EU-regulations were recently introduced, but have not been fully implemented yet. Currency policy is already coping with the EMU, but there is a heated debate on the introduction of the Euro (envisaged for 2008-2010). The free flow of goods, services, and labour within the EU has been established in Hungary with some transitional regulations and restrictions. Competition policy is scrutinized by an independent authority.

Today, Hungary is one of the most stable and consolidated market economies among the new EU member states. Multinational companies, attracted by low corporate taxes and the cheap and skilled labour, invested in the country and thereby contributed considerably to economic growth. The dynamic growth of the service sector is transforming the economy into a modern service economy. Multinational companies are investing in this sector as well and providing the country and its neighbours with advanced services. Through their investments, multinational companies are thus reconstructing the former economic, infrastructural, and service unity of Central Europe and integrating the region into Europe and the global market. This trend was further strengthened by EU-accession. The dynamically developing information technology sector is also making an important contribution to Hungary's economic growth. Agriculture, heavy industry, and mining are the losers in Hungary's transformation to a market economy. However, the economic dynamism recently ceased. This is partly due to the government's fiscal policy; it was oriented towards internal consumption and supported by a credit policy for housing investments that recently had to be stopped. Other important factors include the wage increases related to EU-membership and EU competition policy that forced Hungary to abolish certain tax privileges for multinational investors. Another factor for

losing its leading position in foreign direct investments is certainly the growing competition with the more competitive new EU member states.

Hungary's banking sector is well developed and dynamic and is well controlled by an autonomous agency. There are more problems with investment companies. As a part of its plan to introduce public-private partnerships, the Gyurcsány government in the autumn of 2004 asked this rapidly developing sector of the Hungarian economy for a special contribution to national welfare and growth. Hungary's capital market is increasingly stable and transparent.

2.3. Stability of currency and prices

Compared to the 1990s, the inflation rate is now lower and more stable. However, the irresponsibility of the Fidesz government's „electoral budget" in 2002 also characterized the budgets at both social-liberal governments. Within fiscal and economic policy, one of the mistakes of the Medgyessy government was declaring to uphold all populist measures taken by Fidesz, including state credit for students, cheap housing credits, and generous financial support of Hungarians abroad. The social-liberal governments had planned to raise the salaries within the public sector, provide maternal allowances, and increase some of the social welfare benefits. However, the Medgyessy and the Gyurcsány governments should have to abandon these policies, because they endanger competitiveness and growth. The independence of the Central Bank is under threat due to a decision of the Gyurcsány government to reorganize its Monetary Council and thereby open it to the government's fiscal policy demands. By the end of 2004, the respective bill was sent back to Parliament by the President of Republic. As the Parliament confirmed the legal act with the government's majority, this might be an object of constitutional review in the future.

On the macroeconomic-level there is still not sufficient stability. As the measures against public debt did not succeed, in 2003 Medgyessy had to replace the Minister of Finances. In 2004 he had to step down as Prime Minister. Medgyessy's Minister of Finances, Tibor Draskovics, was preserved by the Gyurcsány government, but his concept to consolidate the budget and raise competitiveness under the present conditions has still not brought the desired results. Another serious problem is the tension between the economic and fiscal policy of the Socialist led governments and the currency policy of the Central Bank. The latter provided the stability of the Forint by actual revaluation against the Euro. The revaluation contributed to diminishing foreign debts, but it also curbed the export of consumer goods.

So far, the two Socialist led governments have not been able to break completely with Fidesz's populist economic and fiscal policy. Medgyessy's policy was criticized as inactive, non-innovative, and soft. Gyurcsány is trying to establish a Hungarian „Third Way", but after the first three months in government its profile is still not clear. At the end of 2004, the Hungarian budget was criticized by the EU, because it exceeded the EMU deficit criteria. According to the EU, this was due in particular to the missing healthcare reform.

2.4. Private property

Private property has a clear legal basis in Hungary. The private sector dominates the economy. The government actually intends to pursue further privatization. The „strategic" branches of the economy were privatized during the 1990s. Today's discussion on further privatization concerns those branches that are differently organized – private or public or mixed – in the Western societies as well. Both social-liberal governments have shown a tendency for privatizing even traditional public sectors like transport, education, healthcare, and prisons. However, as a clear majority showed in the referendum on December 5, 2004, regarding the privatization of healthcare, the electorate rejects further privatization. Extending privatization to higher education, as planned by the Minister of Education is also rejected by the public. In line with the Communist Party, the „middle class party" Fidesz is considering the prospects of imposing a general stop on further privatization through a new referendum initiative. This could block the „Third Way" economic policy in Hungary, which is inspired by Anthony Giddens' theory and Blair's practice to give up traditional social democratic public policies by reducing the role of the state and deregulating the economy.

2.5. Welfare regime

About a quarter of the Hungarian population lives on the level of minimal wage. However, the high number of early retired persons – a common feature in post-Communist societies – and the fact that even entrepreneurs and professionals declare themselves and their families as living from the minimal wage as a means to be entitled to welfare services should be considered. The actual figure of people living on the minimum wage is therefore somewhat lower.

Hungary has a welfare system targeted to fight poverty and provide equal opportunities to all citizens. There is a healthcare system, unemployment insurance, pensions, a system of social assistance, and an extending governmental programme for the handicapped. Although some elements of the former Communist system remained, the present system is comparable to the continental European welfare mix, albeit on a lower level. Fidesz provided extended social

benefits and family allowances, but the new Socialist led governments reduced social welfare for the upper classes. As in their opinion welfare should follow the principle of need, income related benefits were recently introduced as a guiding principle for welfare entitlements. Different welfare models are being discussed, but the present government clearly favours more privatization and more income related and targeted welfare policies. The Churches' charity system and institutions have partly been re-established, but they do not have a large coverage. As the principle of subsidiarity prescribes, local governments and municipalities are getting increasing responsibility in social welfare. „Corporate citizenship" is a marked characteristic of the multinational companies' activities in Hungary. Like in other countries, they run their own supplementary welfare schemes.

The pension scheme has been partially privatized, but welfare reform will not be complete without the healthcare system being generally and conceptually renewed. Healthcare has actually been partly changed since 1989, but without a basic reorientation. The quality of healthcare is very low, and services are provided often arbitrarily to the well-off through a corruption network within the healthcare system. The wages of the healthcare personnel are low and so it is considered normal to pay them bribes for what are supposed to be public and free healthcare services. The present government intends to privatize the healthcare system, but the opposition rejects this plan and can count on the support of the majority of the population. There is a dispute between the actors of the healthcare system – medical associations, trade unions, pharmaceutical companies, and government – about the future of the healthcare system going on for a long time, but so far without coming to a common stance. This became particularly clear in 2004, both in the conflict of the Medgyessy government with the pharmaceutical industry and in the result of the referendum against the privatization of the healthcare system as planned by the Gyurcsány government. There is a popular consensus to uphold the traditional oversized „Communist" healthcare system against the economic rationality of privatization and the interests of the pharmaceutical industry as well as various sorts of health entrepreneurs.

Anti-discrimination legislation and an Office for Equal Opportunities were established, but these are only legal and administrative answers to deeply rooted socioeconomic problems. There is an enormous contradiction between the legal norms of anti-discrimination and equal opportunities and the reality of exclusion and discrimination of the poor, the Roma, refugees, the homeless, the handicapped, and women, especially within the healthcare and educational system. There is a social selection bias in the distribution of the public goods of education, healthcare, and welfare, the result being massive exclusions (the Roma, the homeless, refugees, peasants) and softer ones (the handicapped,

women, the elderly). The „same wage for the same work" principle has been difficult to implement. The government's efforts have brought some institutional and procedural gains for women (violence within the family, discrimination) and the handicapped (programme to change the infrastructure). To raise the Roma's standard of living is an almost unattainable task, considering their unemployment rates, their traditional family and kinship structures, and their sub-cultural character. Current government programmes do not provide sufficient resources and hence are not very effective.

2.6. Economic strength

The Hungarian economy has had stable growth rates since the mid-1990s, but they are lower than most of the other new EU-members in Eastern Europe. The unemployment rate is somewhat lower than the EU-average. However, national debts are above the EU-average. Foreign direct investment is declining, as some of the other new EU-members and the accession candidates in Eastern Europe offer similar conditions to Hungary, but combined with lower wages and more tax privileges. Fiscal policy has been trying to regain equilibrium for years, but no decisive improvements can be reported. However, even though Hungary has lost its leading role among the new EU member states, it is still among the well performing economies in the EU.

2.7. Sustainability

The Hungarian environmental policy is slowly reaching the EU-benchmarks, but it is still far from standards of the well-performing EU member states. In order to accelerate this process, the head at the Ministry of Environment was replaced in 2003. However, environmental policy still has to fight for prestige and resources in the budget debate. In fact, Hungary's „Third Way" apparently forgot the central role environment and education played in the British concept, for both issues are the losers of Gyurcsány's and Draskovics' new austerity policy. Recent environmental issues are waste separation, the reorganization of natural park management on the basis of public benefit foundations instead of bureaucratic state administration (US-model), the import of pollution from other countries through the rivers, etc. The Ministry of Environment is cooperating with ecological NGOs. This is easier in Hungary than elsewhere; due to the lack of a successful Green party, these organizations are rather depoliticised.

Infrastructure development is being financed by the state, but increasingly also by private investments or EU-projects. According to statistics and compared to the capitals of other new EU member states, the city of Budapest is losing ground; this is the result of rising prices, insufficient infrastructure, and precarious security. The construction of a new underground line has been postponed since 1989. Without infrastructural investments in the further development of roads, railways, and public transport, the traffic system will continue to worsen.

According to some international surveys, Hungary is performing well in education, but the PISA-study came to other conclusions. The educational system from the interwar period – especially those classical lyceums that have once produced several Nobel Prize winners – belongs to the past. Surprisingly, the Communist system upheld parts of that system, although it abolished Church based education. The Churches are starting to play a certain role in education again, but 15 years are too short a period to evaluate their performance. The public educational system is not only in a fiscal and economic crisis, but also in a personnel crisis, as talented teachers are leaving the schools in mass. After transition, higher education received decisive impulses and the old elite-universities have since been going through a fast transformation process to mass universities. The registration quota in Hungarian universities now resembles the ones in West European countries, but only at the price of an overloaded infrastructure and rising financial needs, especially student loans and salaries of the teaching staff. After the rapid expansion, the Liberal headed Ministry of Education tried to introduce a recent Austrian financing and autonomy model for the universities that is now being fiercely disputed. This is coupled with the implementation of the Bologna principles in a shorter period and a drastic cutback in government subsidies. The higher education reform has been under debate recently, and the Constitutional Court – called in upon the initiative of a small opposition MDF party – already annihilated the first ministerial reforms, ruling that the new system is unconstitutional. The opposition (Fidesz) has promised to fight the Europeanization and privatisation trends in higher education and thereby met the demands of many vested interests in education policy. As in the case of healthcare, Fidesz is using communitarian arguments and defending the Communist legacy against the Europeanizing and privatising Liberals and „Third Way" Socialists.

3. Management

3.1. Level of difficulty

Hungary's democratic consolidation was one of the easiest and fastest in post-Communist Europe. The starting conditions were favourable, both in economics and in politics. As compared to the other COMECON-countries, the starting conditions for economic development were better and fairly balanced. A well performing educational system provided skilled labour; the country's borders were safe; there were neither violent political conflicts nor the danger of social unrest. All this proved to be of advantage for the transformation process and democratic consolidation. Another asset was the tradition of rule of law from the old Hungarian state during the Habsburg Empire. The recent EU-accession

will certainly be an important factor in the further process of improving the quality of democracy.

Hungary has a rather ethnically homogenous society. The intensity of ethnic, religious, and social conflicts and their capacity of mass mobilization is comparatively low and has not reached the level of political violence so far. The problems related to the Roma are social and cultural rather than political and did not lead to political or protest mobilization. However, so far politics has not succeeded in changing the attitudes of the society vis-à-vis the Roma.

While the new parliamentarianism has certain roots in the older pre-Communist tradition, the parties themselves lack roots in the wider population. In 2002, the Medgyessy government envisaged to integrate the polarized public, give the transition to market economy a social welfare turn, strengthen the democratic institutions, and further improve the implementation of the rule of law as well as the equality of opportunities. The turnover of governments was carried out peacefully, albeit with mass mobilizations by the political action committees of the Centre-Right parties. The social mobilization diminished, but the division of the public turned out to be persistent, as the referendum on Hungarian citizenship for Hungarians abroad along the political Left-Right-cleavage showed. The „republican unity" propagated by the moderate Left is thus being challenged by an increasingly nationalist-populist Right.

The fight against corruption has not been very successful, and the Left parties now have to deal with their own corruption cases as well. Some interference into the freedom of press by Fidesz was cured; others – such as the rightwing tendency of Hungarian broadcasting – remain. Judiciary reform continues, but at a slow pace. The turn in economic policy from protectionist populism to growth has not yet been concluded. However, EU-accession provided very favourable conditions for stability that may facilitate a „new wave" of economic and political consolidation.

3.2. Steering capability

There is some continuity of the governance – the welfare correction of the market, Europeanization, republicanism, justice, the centrality of middle classes, equal opportunities, the fight against corruption and discrimination – of both Socialist led governments. The governance style has been bottom-up rather than top-down, with civil society supporting and organizing public criticism towards the institutions. While the governments' EU-orientation is unequivocally clear, in the opposition Fidesz started to move towards nationalist Euro-scepticism. Both the 2003 referendum on the EU-accession and the 2004 referendum on citizenship highlighted the difference between the opposition's and the government's positions, but also dissent within society. There is a need for reconciliation and a common basic consensus for the immediate future.

Both social-liberal governments implemented judicial reform and anti-corruption mechanisms with little success. The main achievement was the resolution on EU-accession and harmonization of EU- and Hungarian law. The new economic policies have still not been improved and the old fiscal deficits and overall indebtedness of the state remain. The welfare reform is making only slow progress, as the deficits within the public services have not been markedly improved. The healthcare reform has almost come to a deadlock. The introduction of progressive multilevel governance will certainly have positive effects on regional and local governance. However, the reform of local and regional self-government and administration is a heavy burden, the Gyurcsány government up to now seems not able to cope with. However, the concept of a market friendly and socially sensitive „Third Way", on which the present government is embarking, could strengthen the modernization of the country. If the government keeps this course, it will be an example of political learning from the mistakes and failures of the past.

3.3. Resource efficiency

Both Socialist led governments had clear concepts but not sufficient political will and capacity to realize their political programmes. Unlike 1994-98, when HSP had an absolute majority, the small coalition partner SZDSZ has been necessary to uphold the government's majority and thus has been able to veto decisions in the governing coalition. Hungary's "Third Way" Socialism is being blocked both by SZDSZ's privatisation policy in the economy and the educational system and by the populist economic policy inherited from Fidesz. The latter has been reformulated many times by the changing Ministers of Finances as well as by the new government's budget priorities. Its one invariable feature has been the governments' inability to abandon populism for the sake of a promising export and growth orientation. Medgyessy's retreat was de facto set off by his decision to fire the Minister of Economic Development appointed by SZDSZ. The Liberals did not accept this and declared it as the end of the coalition. In August 2004, Medgyessy's own party deprived him of its further support. Other reasons for his failure were his own and his government's incapacity to manage successful campaigns for the EU-referendum in 2003 and the EU-elections in 2004 as well as the lack of growth and competitiveness within economic and fiscal policy. The Medgyessy government did not make efficient use of the available economic and human resources.

The fact that corruption within the public administration exists at all levels has not been adequately addressed by government policies or administrative reorganization. The social-liberal governments did not review the corruption cases within the previous governments either. In 2004, Hungary's Corruption Perceptions Index (CPI) score ranked 42nd out of 146 countries.

3.4. Consensus-building

In Hungary, the establishment of a market economy and parliamentary democracy was not rejected by any relevant political actor. In this respect, there are no influential veto-players in the country.

While a consensus on republicanism, social market economy, and Europeanism is just emerging among the Socialist and Liberal public, there is a considerable part of the Hungarian society supporting nationalistic views and having xenophobic attitudes. Racism's main target group are the Roma, but to a smaller extent there is anti-Semitism as well. Oppositional networks, parts of the media, and a nationalist subculture claim „the" Hungarian identity in terms of „friends and foe": „We are the nation and they are the traitors". The government has not yet been able to bridge this gap between Left and Right in the population.

The present governing coalition partners agreed on the common basis of Europeanism, rule of law, and republicanism as opposed to Fidesz's nationalism, Euro-scepticism, and church-rural-tradition orientation. This ideological conflict will characterize the further process of Europeanization and democratic governance. At present, the Gyurcsány government enjoys the Socialist party's and the coalition partner's full support, and it is also gaining popular support. This should enable the new government to realize its political programme of social welfare and economic modernization. But there have already been some tensions. For instance, by the end of 2004, the Liberal Minister of Education had provoked the first real Church-based mass mobilization against the government since 1989 on the issue of financial support for the Church's education centres. The Prime Minister then immediately withdrew the contested decision. The Socialists thus seem to be more conscious about their relations to the Church than the Liberals.

3.5. International Cooperation

Since 1989, there has been a consequent foreign policy orientation towards the West supported by both Left and Right and their respective governments. Milestones of this development were the accession to WTO (1995), OECD (1996), NATO (1999), and the EU (2004). EU-accession was supported by the Western countries and their global organizational frameworks. Hungary has become a reliable partner of the transatlantic community.

In the Kosovo conflict and the second US-war on Iraq, Hungary took the side of the Western alliance. Regarding Iraq, there were two contradictory lines within the government. The disagreement between the US and the EU on the strategy to follow in Iraq brought some confusion into the Western orientation

in Eastern Europe. Hungary went on with other states to support the US-intervention but withdrew from military participation in 2004 because the government did not get the necessary support from the opposition in Parliament. However, the government provided technical support to the US troops and sent a small technical division to Iraq as a symbol for the Hungarian support.

A second pillar of Hungarian foreign policy is the concern for the millions of ethnic Hungarians in the successor states of the Austro-Hungarian Empire after 1918. Since before 1989 the minority issue was a taboo, its boom afterwards is not surprising. As in the case of Western integration, there was a consensus between the main political parties to find a peaceful way of supporting Hungarian minorities abroad. In 2001-2002, Fidesz and its coalition passed a so-called „Status Law" on the provision of cultural, educational, and welfare services to all registered ethnic Hungarians abroad. By that time, there already was a strong lobby within the Hungarian political elites striving for full Hungarian citizenship for all ethnic Hungarians. But while in government, Fidesz did not fully support this in order to avoid problems in the process of EU-accession. In 2004 however, when the NGO *Magyarok Világszövetsége* (World Federation of Hungarians) started a referendum campaign, Fidesz, now in the opposition, joined it as a means to de-legitimize the social-liberal government. The government actually promised more aid for the Hungarian minorities abroad but declared the citizenship issue as voted down by the public. It expects that EU-membership within an enlarged community will provide enough space for the communication with the ethnic Hungarians in other countries. Both governments have tried to maintain a good relationship with Hungary's Central and Eastern European neighbours and at the same time provide efficient help to the Hungarian minorities abroad and thereby preserve their Hungarian identity.

These differences show that at no time since the transition to democracy at the end of the 1980s, has a consensus on foreign policy issues been as out of reach as it is at present. In 1989, EU-membership and solidarity with the Hungarian minorities abroad were the ultimate and unifying goals for the new democratic forces. Today, the political parties and blocs appear divided over crucial foreign policy issues (EU; Hungarian minorities abroad).

4. Trends in development

4.1. Democratic development

The criteria of monopoly of state power, of political community, and of secularisation had already been met before; this did not change during the period 2003-2005. The elections were free and fair. In August-September 2004, there

was a government reshuffle by the coalition parties in a constitutional manner. Freedom of choice and civil rights are guaranteed. Both social-liberal governments have made some efforts to provide equal opportunities and fight racial, sexual, and social discrimination, but implementing these programmes will require a longer period of efficient resource mobilization by the political elites and civil society. EU-membership is a stabilizing factor.

The new elite's anti-corruption campaign has proved ineffective. As recent cases and past experiences with the first social-liberal government in the mid 1990s show, the Socialist and Liberal elites are not any less corrupt than the Christian-democrats and Conservatives. The problem has deep economic and cultural roots within clientelism, informalism, and political culture.

The local government reform and regionalisation are blocked, and did not benefit from EU-accession in the short run. The efficacy of local government depends much on the region's resources and socioeconomic development. The great East-West and urban-rural discrepancies should therefore be met by adequate development policies.

As before, the basic constitutional organs ensured stability during the last two years. There is still some tension between institutions like the Constitutional Court or the Central Bank and progressive governments, as the latter tend to perceive institutional checks and balances as hindrances to their radical reformism. But the Constitutional Court preserved its importance during the two Socialist led governments and blocked some expansions of governmental power. The effects of the referendum on December 5, 2004, were polarizing. There is a growing alienation between Hungary and the Hungarian minority communities abroad, with the latter feeling rejected, betrayed, and left alone by their mother country. While the government parties are trying to restore the unity of the Hungarian political community on a European-republican basis, Fidesz and MDF stress the national identity instead.

4.2. Market economy development

Macroeconomic indicators attest Hungary a high standard among the new EU-members. Due to progressive taxation on middle and high incomes, and tax reduction on incomes by the „Third Way" Socialists' tax policy, income differences may not increase rapidly. The government has developed this redistributional tax policy even further within the 2005 budget.

Hungary progressed in making its economy EU-compatible. There is a growing transparency of and reliability in the financial and capital market. Stability once brought a considerable influx of foreign direct investment to Hungary. As transparency is now being demanded from all the new Eastern European mem-

ber states, Hungary has lost its previous competitive advantages, and foreign direct investment is being more equally distributed in the region. All currency constraints have been removed. Foreign trade has been liberalized according to EU-standards. The economic, banking, and fiscal regulations resemble EU-standards. However, in 2004 the Gyurcsány government worked out an agreement with the banking sector to introduce progressive taxation on banking from 2005 onwards. The government intends to reallocate the peak profit for welfare and public benefits, according to its „Third Way" vision.

EU-accession will enable Hungary to keep up with Rhineland type social market economy and neo-corporatism in the long run. Inflation is under control. It was not possible to reduce corporate and income taxes as drastically as the Socialists' Liberal coalition partner intended, as it was necessary to reassign the tax burden to the well-off and redistribute income for the benefit of the poor. There have been severe cutbacks in the public expenditures, but they were coupled with new welfare measures raising expenditures and taxes as well as demanding more control and bureaucracy. Both governments have fought against the high budget deficit, but with only modest success so far.

III. Overall evaluation

Starting conditions: The starting conditions for the further consolidation of Hungarian democracy were quite favourable, as there were no problems concerning stateness and well performing economic structures had been established. Some civic and rule of law traditions in Hungarian political culture and history proved conducive to a stable constitutionalism and the acceptance of minority rights. On the other hand, the Medgyessy and Gyurcsány governments inherited economic and fiscal policies with populist expenditures and a highly polarized public from the 1998-2002 Fidesz government. Moreover, the former conservative government had threatened the functions of parliamentarism, the electoral system, as well as the all-party media consensus, and followed a nationalist turn in foreign policy.

Status and development: Some of these counter-productive elements to an improvement of the already consolidated democracy could be revoked, as the reorientation in foreign policy, the media policy, and the work in Parliament clearly show. In terms of the quality of democracy, Hungary is not far from the „old" EU member states.

Management: Despite some accomplishments in foreign (EU-accession) as well as in domestic policy (reinforcement and further consolidation of democracy, support for civil society), some problems remain: the missing shift of

economic, social, and fiscal policy from populism to growth and competitiveness; the slow-down in the implementation of regionalisation and decentralisation; the political polarisation within Hungarian public, and the tensions with neighbouring countries over the citizenship status of ethnic Hungarians. Both social-liberal governments tried to build up a wide political consensus based on Europeanism and republicanism, but Fidesz is reacting with Euro-scepticism and nationalism from the opposition. Among the elites and the general population, there is a basic acceptance of non-violence as well as a commitment to democratic and constitutional norms. There is no home-grown terrorism that goes beyond provocations such as the (forbidden) use of fascist and communist symbols. Political extremism and violence do not pose any threat to the consolidated Hungarian democracy.

IV. Party acronyms mentioned in the text

Fidesz has changed its name many times. During the period in question, it was called *Fidesz-Magyar Polgári Párt* – later in 2003, instead of *„Párt"* there is *„Szövetség"* –, so the short name is Fidesz.

Magyar Szocialista Párt, HSP, Hungarian Socialist Party, Socialists, Social Democrats

Szabad Demokraták Szövetsége, SZDSZ, Free Democrats, Liberals

Magyar Demokrata Fórum, MDF

Munkáspárt, Worker's Party, Communists

Not mentioned in the text

Magyar Igazság és Élet Pártja, MIÉP

There are some irrelevant extra-parliamentary Green parties.

FkGP, the Smallholders of Torgyán, *Kereszténydemokrata Néppárt* and the Christian Democrats practically vanished during the period in question, so they are not mentioned in the text.

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SUMMARY

Hungary Between the Last Elections and the New Government (2002-2004)

MÁTÉ SZABÓ

Hungary has developed into one of the most stable parliamentary democracies among the new EU member states. Stateness is not a contested issue. The elections were free and fair and enjoyed high participation. The 2002 elected legislature and social-liberal coalition were able to hold office. In 2004, the coalition parties carried out a government reshuffle in a peaceful and constitutional manner. The Constitutional Court proved its independence by blocking the expansion of governmental power. Freedom of choice and civil rights are guaranteed. Both social-liberal governments (2002-2004; 2004 pp.) made efforts to provide equal opportunities by introducing anti-discrimination programmes. Civil society is receiving financial aid from the government, and it has been incorporated into the policy implementation process, especially in the area of social welfare. Corruption is widely spread within public administration, and no effective counter measures have been taken so far.

RESÜMEE

Ungarn zwischen den letzten Wahlen und der neuen Regierung (2002-2004)

MÁTÉ SZABÓ

Ungarn hat sich zu einer der stabilsten parlamentarischen Demokratien der neuen Mitgliedstaaten entwickelt. Die Rechtsstaatlichkeit ist unumstritten. Die Wahlen waren frei und fair, die Wahlbeteiligung hoch. Die 2002 gewählte gesetzgebende Gewalt und die sozial-liberale Koalition konnten in Amt treten. 2004 haben die Koalitionsparteien die Regierung auf friedlichem Wege und verfassungsmäßig umorganisiert. Das Verfassungsgericht demonstrierte seine Unabhängigkeit, indem es die Expansion der Regierungsmacht blockierte. Die freie Wahl und die Bürgerrechte sind gewährleistet. Beide sozial-liberale Regierungen (2002-2004; und die seit 2004) waren bemüht, die Chancengleichheit durch Antidiskriminierungsprogramme zu gewährleisten. Die Zivilgesellschaft erhält finanzielle Fördermittel von der Regierung und wurde in die Durchführungsprozesse eingebunden, besonders auf dem Gebiet der sozialen Wohlfahrt. Korruption ist in der öffentlichen Verwaltung weit verbreitet, bisher wurden jedoch keine effektiven Gegenmaßnahmen ergriffen.

RANKING OF THE CITIES RECOGNIZED BETWEEN 1983 AND 1995 BY THEIR GRADE OF DEVELOPMENT

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The measurement of the development of settlements and the urbanisation level of cities is an old and recurring problem of city-statistics and urban studies. Which criteria define the urbanisation level of cities? Are our cities urbanised? The former question is answered by professional literature in several ways. The concept of the city is defined in different ways in the different countries. In Hungary settlements with a legal status – i.e. settlements that are declared to be cities by provision of law – are called cities. Naturally there are differences in degree among these cities too, since there are cities in the administrative sense, but showing only a low level of urbanisation as regards their grade of development.

Urban development is defined by the role a settlement plays in its surroundings, the tasks it fulfils, the fairly large number of population, the high density of its downtown population, the high rate of urban professions (industry, trade, transportation, services), the large number of high-rise apartment-blocks, the local transport, the amount of artificial surroundings, the improved level of public utilities, the number of social and cultural institutions and the degree of supply of the population.

The examination of the development level of cities has been made a topic by the fact that during the past two decades – following the disappearance of districts – the number of cities has suddenly increased. At the turn of the 20th century there were merely 14 cities on the territory of the present-day Hungary, and during the following fifty years only ten more settlements were officially ranked as cities. After 1950 the number of cities grew faster due to the increased speed of industrialization, at the time of the 1960 census there were already 62 cities, including Budapest. In the sixties this process slowed down, only seven settlements were given the legal status of a city, while in the seventies there was another wave, when again a lot of settlements were officially ranked as cities. In 1973 there were 83 cities, in 1978 this number was 96, in 1989 40 settlements got the legal status of a city, in 1990 the number of cities was 148, in 1995 it was 200, in 2003 it was 252.

With this dramatic increase in the number of cities the question emerges whether these new cities are urbanized, and if yes, to what extent. To answer this question I have examined cities that have been given the legal status of a city between 1983 and 1995, altogether 104 of them. Out of these 27 settlements were given the legal status of a city between 1983 and 1986, 40 of them in 1989, 30 between 1990 and 1993 and 6 in 1995. 68 of these new cities are in Bács-Kiskun, Békés, Hajdú-Bihar, Jász-Nagykun-Szolnok, Pest, Somogy and Szabolcs-Szatmár-Bereg counties, 33 are in Csongrád, Fejér, Heves, Komárom-Esztergom, Nógrád, Tolna, Vas, Veszprém and Zala counties and only 3 are in Baranya and Győr-Moson-Sopron counties.

The comparison of every-day statistics has been made so far by intensity ratios, most suitable for the investigation of the degree of supply. The existing indexes, however, give only in a single respect a base of comparison. As the development of cities is influenced by a great number of factors, different and independent from one another, intensity ratios cannot be suitable for their investigation. They would result in as many different ranking lists as intensity ratios. It is by no means sure that a city, which regarding public utilities has the first place tops the list in sanitation or cultural development as well. Intensity ratios are also unsuitable for the analysis of the conditions of a single city, without comparison to others, should the goal be to find the fields with deficiencies and those, where the supply of the city is satisfactory, since each intensity ratio is expressed by a different unit of measurement.

These unsolved problems directed the attention of specialists to the development of a complex method that would make possible the ranking of the cities based on objective criteria. As my method of examination I used the complex index for regional grade of development, which I developed in 1963 and which – since then – has been presented by me on international forums (IUSSP, IARUS) and has also been used several times by CSO (Central Statistical Office) when creating the ranking order of regions. Foreign and Hungarian authors are unanimous in stating that the determination of the character and of the grade of development of a city is composed of two steps:

a) A decision should be taken regarding the selection of the factors that determine the character and the grade of development of a city

b) Then on the basis of numerical values resulting from the selected factors a complex index should be developed.

To examine the grade of development and the degree of supply of cities I used as sources the following intensity ratios:

Dwellings per 100 inhabitants

Number of public lighting spots per 1 km length of downtown public roads

Length of piped gas per 1 km of downtown public roads

Length of public water-conduit per 1 km of downtown public roads

Length of public sewage network per 1 km of downtown public roads

Number of hospital beds per 1000 inhabitants

Number of classrooms per 100 secondary school students

Number of enterprises per 1000 inhabitants

Number of catering outlets per 10000 inhabitants

Proportion of commuters compared to the total population

Number of non-agricultural wage-earners compared to the total number of wage-earners

Undoubtedly, a lot more indices would have been necessary for the measurement of urbanisation, but these were either not available (number of high-rise apartment blocks, data of local transportation), or – while being amply available (like eg. the data of public health, or cultural supply) – processing them would have exceeded the limits of this modest study. In this study I took as a starting point the calculation of the above-mentioned index figures of the selected cities (Table no.1). On the basis of these index figures I defined the „average city" created from the data of the cities selected for the study. This is a hypothetical city, each index figure of which is a weighted mathematical average of the index figures of intensity belonging to the cities subject to the study. During the weighting process the number of population, the length of downtown public roads, the number of secondary school students and the number of wage earners were regarded as the weight. The parameters of the „average city" created this way are presented in the last line of Table no. 1.

Table no.1.

Intensity ratios of the 104 cities[1*]

Name of the city	Year	Dwellings per 100 citizens	Number of public lighting spots	Length of piped gas	Length of public water conduit	Length of public sewage network	Number of hospital beds per 1000 citizens	Number of classrooms per 100 secondary school students	Number of enterprises per 1000 citizens	Number of catering outlets per 10000 citizens	Proportion of commuters compared to total population	Proportion of non-agricultural wage-earners compared to total number of wage-earners
			per 1 km downtown public roads									
Abony	1993	38,3	18,0	1,2	0,9	0,4	0,0	7,5	41,4	31,5	1,3	80,6
Aszód	1991	36,6	16,7	1,2	1,0	0,3	0,0	4,6	57,4	70,8	17,2	93,8
Bácsalmás	1986	44,2	14,6	1,7	0,7	0,1	0,0	3,6	47,3	21,3	11,5	61,8
Baktalórántháza	1993	32,3	14,8	1,7	1,0	0,3	0,0	2,8	40,4	66,4	28,5	81,9
Balatonalmádi	1989	44,7	15,6	0,5	0,6	0,4	0,0	3,2	104,9	76,8	10,8	96,6
Balatonboglár	1991	43,0	21,8	1,2	0,6	0,5	0,0	5,4	102,6	91,7	0,0	74,7
Balatonföldvár	1992	45,8	31,7	0,9	1,3	1,2	0,0	0,0	130,3	583,6	38,4	92,5
Balatonlelle	1991	42,6	26,8	0,7	1,1	0,9	0,0	0,0	107,2	375,0	39,8	74,7
Balmazújváros	1989	34,2	17,4	1,5	1,3	0,3	0,0	4,2	41,3	50,4	1,3	62,1
Bátaszék	1995	36,6	20,5	1,6	1,1	0,3	0,0	4,3	59,4	46,2	13,0	82,0
Bátonyterenye	1989	40,1	19,1	0,8	1,1	0,4	0,0	2,5	41,5	31,2	15,4	94,3
Battonya	1989	48,9	12,3	0,9	0,7	0,1	0,0	3,7	32,8	55,6	2,2	69,5
Bicske	1986	35,4	18,9	0,4	1,3	0,5	0,0	4,5	52,5	51,5	17,7	89,9
Biharkeresztes	1989	38,7	21,6	1,4	0,8	0,1	0,0	3,1	46,3	46,7	17,3	81,9

[1] Sources: Területi statisztikai Évkönyv, KSH (Regional Statistical Yearbook), 1996. CSO. Budapest, 1998.
1990. évi Népszámlálás Megyei kötetei (County volumes of the 1990 Census)
1990. évi Népszámlálás, Az aktív keresők munkahelye és lakóhelye. (1990 Census, Places of work and dwelling-places of active wage-earners)

Name of the city	Year	Dwellings per 100 citizens	Number of public lighting spots	Length of piped gas	Length of public water conduit	Length of public sewage network	Number of hospital beds per 1000 citizens	Number of classrooms per 100 secondary school students	Number of enterprises per 1000 citizens	Number of catering outlets per 10000 citizens	Proportion of commuters compared to total population	Proportion of non-agricultural wage-earners compared to total number of wage-earners
			per 1 km downtown public roads									
Budaörs	1986	37,0	22,8	1,5	0,9	1,0	0,0	3,5	126,5	57,7	28,2	90,8
Csenger	1989	36,5	18,8	1,6	0,7	0,1	0,0	3,4	52,6	44,3	9,1	72,1
Csepreg	1995	36,4	25,4	1,4	0,9	0,5	0,0	3,0	63,9	41,2	7,5	67,8
Csurgó	1989	36,5	12,3	0,5	0,4	0,1	0,0	4,4	61,2	46,2	15,3	71,6
Dabas	1989	36,8	15,2	1,3	0,7	0,1	0,0	4,1	78,4	51,0	8,9	70,0
Derecske	1991	35,6	16,4	1,1	0,8	0,1	0,0	3,3	66,3	31,9	3,1	77,8
Dorog	1984	23,7	25,2	1,0	2,0	0,8	3,7	4,2	37,2	36,4	26,6	98,1
Dunaföldvár	1989	28,8	16,6	1,2	0,7	0,2	0,0	4,4	41,9	43,7	2,8	81,0
Edelény	1986	32,4	14,9	1,2	1,0	0,4	21,0	5,5	40,7	38,3	9,7	84,3
Encs	1984	32,5	16,7	0,0	0,9	0,5	0,0	4,5	54,0	71,3	18,9	87,9
Enying	1992	34,5	12,9	1,4	0,8	0,0	0,0	3,1	48,1	43,8	5,2	65,2
Fertõd	1995	31,9	9,1	0,8	0,7	0,1	0,0	4,3	76,0	87,7	24,1	65,9
Fonyód	1989	40,4	23,2	0,6	1,1	0,3	0,0	3,5	118,2	522,8	31,4	82,1
Füzesabony	1989	37,4	21,5	1,4	1,1	0,2	0,0	3,0	55,2	43,8	23,2	88,0
Gárdony	1989	37,8	18,6	1,2	1,1	0,5	0,0	0,0	72,8	300,9	11,2	71,1
Gyomaendrõd	1989	41,3	6,5	0,5	0,4	0,1	1,4	3,9	57,8	52,3	3,5	70,8
Hajdúdorog	1989	39,9	17,0	1,3	1,0	0,2	0,0	4,3	43,0	43,6	1,0	71,4
Hajdúhadház	1991	32,2	23,7	1,4	1,0	0,0	0,0	4,5	24,6	21,2	14,2	73,9
Heves	1984	36,3	22,5	1,4	1,1	0,6	0,0	3,3	50,1	48,9	8,8	81,4
Héviz	1992	45,9	24,7	1,4	0,9	0,4	123,0	4,9	147,4	358,8	48,8	93,2
Ibrány	1993	33,4	12,7	1,0	0,9	0,5	0,0	3,4	39,8	40,1	2,2	82,6
Jánoshalma	1989	43,4	12,9	1,3	0,8	0,1	0,0	4,7	51,5	34,4	2,6	58,5

Name of the city	Year	Dwellings per 100 citizens	Number of public lighting spots	Length of piped gas	Length of public water conduit	Length of public sewage network	Number of hospital beds per 1000 citizens	Number of classrooms per 100 secondary school students	Number of enterprises per 1000 citizens	Number of catering outlets per 10000 citizens	Proportion of commuters compared to total population	Proportion of non-agricultural wage-earners compared to total number of wage-earners
			per 1 km downtown public roads									
Jászapáti	1989	38,8	23,9	1,3	1,1	0,1	0,0	2,8	39,5	53,8	4,1	76,6
Jászárokszállás	1991	44,9	10,6	0,8	0,8	0,2	0,0	6,2	49,1	47,8	3,0	77,9
Jászfényszaru	1993	45,0	25,2	1,1	1,0	0,0	0,0	0,0	36,2	33,1	6,8	78,7
Kecel	1993	43,1	22,5	1,5	1,0	0,0	0,0	0,0	53,2	40,8	2,4	43,8
Kisbér	1986	36,9	14,7	1,8	1,6	0,1	15,8	5,4	59,5	39,1	14,7	78,5
Kiskunmajsa	1989	41,3	21,4	1,4	1,0	0,1	0,0	3,9	58,9	85,2	4,4	61,6
Kistelek	1989	44,2	12,6	1,7	0,9	0,2	0,0	3,5	62,4	49,1	7,8	78,9
Kunhegyes	1989	38,9	16,9	1,3	1,1	0,2	2,3	3,5	46,0	53,4	7,2	72,5
Kunszentmárton	1986	41,5	20,4	0,8	0,9	0,3	0,0	2,7	49,5	51,3	8,1	77,6
Kunszentmiklós	1989	39,3	13,2	1,1	0,8	0,1	0,0	5,2	50,7	33,9	5,8	82,4
Lajosmizse	1993	40,8	22,2	1,4	0,8	0,2	0,0	0,0	67,9	53,3	5,7	60,9
Lengyeltóti	1992	34,4	22,9	1,1	1,1	0,0	0,0	0,0	53,9	35,3	11,4	67,3
Letenye	1989	32,1	20,0	1,4	1,1	1,0	0,0	0,0	53,5	69,1	12,7	83,5
Lõrinci	1992	39,7	15,6	1,3	1,4	0,2	0,0	0,0	33,8	46,9	18,9	94,3
Máriapócs	1993	31,0	15,8	1,1	0,8	0,0	0,0	0,0	37,2	55,0	22,5	57,4
Martfû	1989	35,9	25,9	1,3	1,4	1,4	0,0	3,2	48,5	32,3	35,6	91,4
Mezõberény	1989	39,4	20,6	1,3	1,1	0,3	0,0	3,5	47,3	34,0	3,2	79,5
Mezõcsát	1991	37,3	15,8	2,3	1,0	0,1	0,0	4,5	44,5	43,9	3,8	73,4
Mezõhegyes	1989	45,5	34,3	2,2	1,5	0,3	11,7	3,6	34,8	50,6	12,7	30,4
Mezõkovácsháza	1986	41,2	18,0	1,3	1,0	0,3	0,0	4,3	58,8	75,5	9,8	77,8
Mindszent	1993	42,7	22,2	1,4	1,0	0,1	0,0	0,0	42,7	73,2	2,3	74,3
Monor	1989	34,9	17,4	0,9	0,7	0,1	0,0	2,4	60,9	60,1	10,0	88,9

Name of the city	Year	Dwellings per 100 citizens	Number of public lighting spots	Length of piped gas	Length of public water conduit	Length of public sewage network	Number of hospital beds per 1000 citizens	Number of classrooms per 100 secondary school students	Number of enterprises per 1000 citizens	Number of catering outlets per 10000 citizens	Proportion of commuters compared to total population	Proportion of non-agricultural wage-earners compared to total number of wage-earners
			per 1 km downtown public roads									
Mór	1984	36,4	23,2	1,2	0,8	0,3	13,2	2,9	47,7	27,2	8,6	86,5
Mórahalom	1989	42,2	17,9	2,1	1,0	0,8	0,0	0,0	53,2	34,8	4,0	59,4
Nádudvar	1989	39,8	14,0	1,6	0,9	0,1	0,0	0,0	39,8	27,0	3,4	34,6
Nagyhalász	1993	32,7	12,8	1,3	0,9	0,6	0,0	0,0	36,0	35,3	7,0	91,0
Nagykálló	1989	34,3	16,1	1,0	0,8	0,2	53,4	3,5	49,2	47,3	8,7	82,4
Nagykáta	1989	39,5	27,0	1,4	1,1	0,1	0,0	2,4	50,5	47,7	11,2	89,2
Nyergesújfalu	1989	34,9	19,7	1,0	1,2	2,0	0,0	4,7	59,6	49,6	19,2	98,0
Nyíradony	1992	34,7	19,5	1,5	1,1	0,2	0,0	0,0	40,5	48,3	2,3	74,4
Pásztó	1984	39,4	19,1	1,3	1,1	0,2	14,8	5,6	82,9	53,4	14,3	84,7
Pécsvárad	1993	35,7	15,2	1,1	0,4	0,2	0,0	0,0	77,2	84,2	19,9	81,2
Pétervására	1989	37,6	23,9	1,3	0,8	0,0	0,0	4,0	53,5	44,9	21,8	86,0
Polgár	1993	41,1	14,9	0,8	0,7	0,1	0,0	4,5	47,8	42,8	6,9	80,5
Putnok	1989	34,5	13,6	0,9	0,9	0,5	0,0	3,8	32,9	17,4	29,6	92,8
Püspökladány	1986	36,0	20,8	1,1	0,9	0,3	1,8	2,3	45,0	31,7	4,3	76,8
Ráckeve	1989	37,9	20,0	0,8	1,0	0,2	0,0	4,2	82,2	67,3	19,6	68,3
Rétság	1989	38,2	12,6	0,7	1,6	0,2	0,0	0,0	77,9	70,2	27,5	87,2
Sajószentpéter	1989	33,5	20,1	1,2	0,8	0,5	0,0	0,0	36,8	29,9	6,3	96,6
Sárbogárd	1986	36,6	12,5	1,5	0,8	0,4	0,0	0,0	45,1	48,3	9,5	81,4
Sarkad	1989	38,7	18,0	1,2	1,2	0,2	0,0	3,7	39,4	43,4	4,8	84,3
Sásd	1995	36,5	17,6	0,0	1,5	1,5	0,0	5,6	69,5	46,5	23,7	78,0
Simontornya	1995	41,5	14,6	0,0	0,9	0,2	0,0	0,0	46,1	74,0	17,5	94,8
Soltvadkert	1993	42,9	13,4	1,2	0,9	0,1	0,0	0,0	89,3	74,1	3,8	48,2

Name of the city	Year	Dwellings per 100 citizens	Number of public lighting spots	Length of piped gas	Length of public water conduit	Length of public sewage network	Number of hospital beds per 1000 citizens	Number of classrooms per 100 secondary school students	Number of enterprises per 1000 citizens	Number of catering outlets per 10000 citizens	Proportion of commuters compared to total population	Proportion of non-agricultural wage-earners compared to total number of wage-earners
			per 1 km downtown public roads									
Sümeg	1984	36,3	32,2	1,4	1,7	0,7	41,4	4,7	64,6	67,3	21,5	84,6
Szabadszállás	1995	46,8	14,3	1,6	0,7	0,0	3,1	5,6	43,0	40,9	1,9	63,0
Szécsény	1986	38,1	25,1	1,3	2,1	0,9	0,0	5,5	62,9	48,7	21,2	84,0
Szeghalom	1984	37,7	23,3	1,6	1,4	0,2	12,5	3,6	49,2	57,5	12,3	79,0
Szentgotthárd	1983	33,6	31,5	1,4	1,0	0,5	16,1	4,5	52,0	65,3	20,1	89,3
Szerencs	1984	37,4	23,9	2,1	0,7	0,3	0,0	3,8	53,4	35,3	35,4	87,4
Szigetszentmiklós	1986	38,2	30,4	1,5	1,3	0,4	0,0	3,5	87,2	45,5	21,5	91,3
Szikszó	1989	35,1	18,5	1,6	1,1	0,2	51,2	4,9	42,2	45,6	9,3	87,8
Tab	1989	37,0	23,0	0,0	0,7	0,4	0,0	2,8	66,6	69,6	24,2	91,5
Tamási	1984	41,5	21,7	0,0	1,0	0,3	0,0	3,4	71,4	72,5	14,1	74,1
Téglás	1991	32,8	12,8	1,6	1,0	0,4	0,0	0,0	29,0	34,2	0,0	73,9
Tiszaföldvár	1993	38,9	14,3	1,4	1,0	0,2	0,0	4,4	39,6	31,6	2,6	73,8
Tiszafüred	1984	38,5	18,4	1,3	1,0	0,3	0,0	5,0	49,4	48,4	3,9	85,8
Tiszakécske	1986	41,7	21,6	1,2	1,1	0,1	0,0	4,2	62,0	111,4	2,2	76,8
Tiszalök	1992	37,9	20,7	1,7	2,0	0,3	0,0	4,7	40,8	81,4	13,9	82,9
Tiszavasvári	1986	32,9	19,1	1,1	0,8	0,2	0,0	3,0	35,3	69,2	3,4	82,8
Tokaj	1986	37,1	21,5	1,0	1,0	0,4	0,0	3,3	52,2	117,2	14,4	92,0
Tolna	1989	37,3	16,7	1,7	1,2	0,6	0,0	5,2	64,4	40,0	8,0	89,4
Tótkomlós	1993	44,4	17,8	1,2	1,0	0,1	0,0	3,4	48,7	69,4	2,7	62,4
Újfehértó	1992	33,0	13,9	1,3	0,9	0,3	0,0	3,1	39,5	35,1	2,0	77,5
Vasvár	1986	39,8	43,6	0,0	0,9	0,2	0,0	3,2	63,7	59,1	13,6	75,5

Name of the city	Year	Dwellings per 100 citizens	Number of public lighting spots	Length of piped gas	Length of public water conduit	Length of public sewage network	Number of hospital beds per 1000 citizens	Number of classrooms per 100 secondary school students	Number of enterprises per 1000 citizens	Number of catering outlets per 10000 citizens	Proportion of commuters compared to total population	Proportion of non-agricultural wage-earners compared to total number of wage-earners
			per 1 km downtown public roads									
Záhony	1989	35,9	29,7	2,0	2,6	1,6	0,0	3,2	47,6	43,5	84,6	98,2
Zalaszentgrót	1984	38,5	16,7	1,2	1,4	0,2	0,0	4,1	60,8	75,1	6,9	82,9
Zirc	1984	36,6	22,1	0,0	1,8	1,1	13,6	3,9	67,5	42,1	9,3	82,8
Average city		37,6	18,3	1,1	1,0	0,3	3,3	3,8	55,7	59,0	11,5	79,2

In general:

Let a_1, a_2, ..., a_m be the criteria on grounds of which we wish to rank cities A_1, A_2, ..., A_n , and the elements of matrix **A** the data of the given cities regarding the specified criteria:

$$\mathbf{A}=\begin{bmatrix} a_{11} & a_{12} & K & a_{1m} \\ a_{21} & a_{22} & K & a_{2m} \\ \vdots & \vdots & & \vdots \\ a_{n1} & a_{n2} & K & a_{nm} \end{bmatrix}$$

where a_{ik} means the numerical value of the i^{th} city regarding the k^{th} criterion. Furthermore, let the $\mathbf{Q}=\|q_{ik}\|$ matrix be

$$\mathbf{Q}=\begin{bmatrix} q_{11} & q_{12} & K & q_{1m} \\ q_{21} & q_{22} & K & q_{2m} \\ \vdots & \vdots & & \vdots \\ q_{n1} & q_{n2} & K & q_{nm} \end{bmatrix}.$$

the parameters regarding cities A_1, A_2, ..., A_n , of which we calculate intensity ratios from the values of matrix **A** . Thus, the intensity ratio of cities A_i regarding the criterion a_k is: $\dfrac{a_{ik}}{q_{ik}}$.

As a first step the $\overline{a}_1$, $\overline{a}_2$,K , $\overline{a}_m$ intensity ratios of average city $\overline{A}$ are calculated.

$$\overline{a}_1=\frac{\frac{a_{11}}{q_{11}}\cdot q_{11}+\frac{a_{21}}{q_{21}}\cdot q_{21}+K+\frac{a_{n1}}{q_{n1}}\cdot q_{n1}}{q_{11}+q_{21}+K+q_{n1}}=\frac{\sum_{i=1}^{n} a_{i1}}{\sum_{i=1}^{n} q_{i1}}$$

$$\overline{a}_2=\frac{\sum a_{i2}}{\sum q_{i2}}$$

$$\vdots$$

$$\overline{a}_k=\frac{\sum a_{ik}}{\sum q_{ik}}$$

$$\vdots$$

$$\overline{a}_m=\frac{\sum a_{im}}{\sum q_{im}}$$

While intensity ratios demonstrate the ranking order of cities within a single criterion, they are not suitable for summarizing, since they are expressed with different units of measurement. Neither do intensity ratios allow us to specify which criteria represent a higher degree of urbanization, and which reflect the deficiencies in the case of a single city.

The next step is to define the supply indices for all the cities, concerning all calculated criteria by dividing the intensity ratio of the selected city by the corresponding intensity ratio of the average city, and multiplying the quotient by one hundred, so that we get the result in percentage. It is evident that all the supply indices of the „average city" are 100%. Of course the supply indices gained this way will not measure the degree of supply, but they will measure the relative supply within the circle of the cities studied, as the parameters of the „average city" have been calculated from the parameters of the cities studied. The supply indices are presented in Table no.2.

By using the nominations from above the supply index b_{ik} of city A_i regarding criteria a_k:

$$\frac{\frac{a_{ik}}{q_{ik}}}{\frac{\sum a_{ik}}{\sum q_{ik}}} \text{ ie. } b_{ik} = \frac{a_{ik}}{q_i} \cdot \frac{\sum_{i=1}^{n} q_i}{\sum_{i=1}^{n} a_{ik}}; \ (k = 1, 2, \text{K}, m)$$

The **B** matrix of these supply indices:

$$\mathbf{B} = \begin{bmatrix} b_{11} & b_{12} & \text{K} & b_{1m} \\ b_{21} & b_{22} & \text{K} & b_{2m} \\ \vdots & \vdots & & \vdots \\ b_{n1} & b_{n2} & \text{K} & b_{nm} \end{bmatrix}$$

These supply indices enable us to compare the studied cities not only on the basis of a certain selected criterion, but also on the basis of all the indices present in a line next to the name of a city, that is, the indices referring to diverse criteria.

Finally, the complex indices of cities are interpreted as follows: by considering the supply indices to be a vector-coordinate, we consider the length of the vector (the square root extracted from the sum of the squares of the supply indices) as being the complex index. The complex index calculated from the supply indices of the 104 cities is presented in the last column of Table no.2. Since all the supply indices of the average city are 100%, its complex index depends exclusively on the number of the indices selected, which in the present case is 331,7.

Regarding the above, the complex index K_i of city A_i is no other, than the absolute value of the m-dimension row-vector created from the i^{th} row of matrix **B** .

$$\mathbf{K}_i = \sqrt{\sum_{k=1}^{m} b_{ik}^2}$$

Table no.2.

The supply indices and complex index of the 104 cities

Name of the city	Year	With dwellings	With public lights	With piped gas	With public water conduit	With public sewage network	With hospital beds	With secondary school classrooms	With enterprises	With catering outlets	Proportion of commuters	Non-agricultural wage-earners	Complex index
		supply index (supplied with the above) expressed in percentage of the average city											
Nádudvar	1989	105,8	76,7	137,4	90,1	16,6	0,0	0,0	71,4	45,8	28,9	43,7	233,0
Gyomaendrõd	1989	109,8	35,7	42,8	37,8	31,6	42,2	102,4	103,8	88,5	29,7	89,4	239,5
Enying	1992	91,7	70,2	118,8	87,9	16,0	0,0	82,5	86,4	74,1	44,6	82,4	252,9
Battonya	1989	130,2	67,0	76,3	68,4	47,4	0,0	97,8	58,9	94,2	18,7	87,7	253,2
Dunaföldvár	1989	76,6	90,8	100,5	75,8	49,4	0,0	116,0	75,2	74,0	24,2	102,3	260,8
Újfehértó	1992	87,6	76,1	117,1	91,6	91,0	0,0	81,5	70,9	59,5	16,7	97,8	262,5
Polgár	1993	109,2	81,3	70,4	69,3	19,3	0,0	118,4	85,8	72,5	59,2	101,6	262,9
Derecske	1991	94,7	89,3	94,5	81,9	42,8	0,0	87,7	119,1	54,1	26,0	98,2	263,7
Jánoshalma	1989	115,4	70,3	113,2	79,6	32,6	0,0	123,5	92,4	58,3	22,3	73,8	267,6
Kecel	1993	114,5	123,0	131,1	99,9	0,0	0,0	0,0	95,6	69,0	20,3	55,3	269,8
Jászfényszaru	1993	119,6	137,4	93,7	102,6	0,0	0,0	0,0	65,1	56,1	57,9	99,4	270,3
Lengyeltóti	1992	91,6	125,0	91,8	110,3	0,0	0,0	0,0	96,7	59,8	96,8	85,0	272,3
Tiszavasvári	1986	87,5	104,5	93,6	86,4	72,9	0,0	80,0	63,4	117,2	28,6	104,5	275,6
Püspökladány	1986	95,9	113,4	100,4	90,7	93,0	55,7	62,0	80,8	53,7	36,3	97,0	275,8
Tiszaföldvár	1993	103,5	78,0	120,8	99,3	70,0	0,0	116,5	71,1	53,5	22,3	93,2	277,1
Csurgó	1989	97,0	67,0	45,4	46,7	45,1	0,0	115,4	110,0	78,2	130,3	90,4	277,2
Kunszentmiklós	1989	104,4	71,9	94,6	80,3	42,3	0,0	138,1	91,0	57,5	49,2	104,0	277,7
Nyíradony	1992	92,4	106,6	127,6	118,7	77,5	0,0	0,0	72,7	81,8	19,6	93,9	278,3
Hajdúdorog	1989	106,1	92,8	114,9	99,2	50,1	0,0	113,3	77,2	73,8	8,2	90,2	279,1
Monor	1989	92,7	95,1	78,9	77,7	45,0	0,0	64,4	109,5	101,7	84,8	112,3	279,6
Bácsalmás	1986	117,5	79,5	151,1	68,3	18,3	0,0	94,3	84,9	36,1	98,2	78,0	284,8
Ibrány	1993	88,7	69,3	83,6	93,2	154,7	0,0	90,6	71,4	67,9	18,5	104,3	285,3
Kunszentmárton	1986	110,3	111,4	68,9	95,4	91,3	0,0	72,4	88,9	87,0	68,6	97,9	285,9
Jászapáti	1989	103,1	130,4	113,5	111,5	18,8	0,0	74,4	70,9	91,1	35,2	96,7	287,7
Tótkomlós	1993	118,2	97,4	109,1	107,0	20,4	0,0	90,2	87,5	117,6	23,2	78,8	289,1
Csenger	1989	97,1	102,7	139,4	76,8	43,5	0,0	89,8	94,4	75,0	77,9	91,1	290,2
Sarkad	1989	102,9	98,0	106,9	123,9	65,7	0,0	97,4	70,8	73,6	40,8	106,4	290,2
Jászárokszállás	1991	119,4	57,9	72,1	87,4	52,8	0,0	164,1	88,2	81,0	25,3	98,3	291,2
Lajosmizse	1993	108,5	121,0	123,7	87,0	65,9	0,0	0,0	121,9	90,4	48,6	76,8	291,4

Name of the city	Year	With dwellings	With public lights	With piped gas	With public water conduit	With public sewage network	With hospital beds	With secondary school classrooms	With enterprises	With catering outlets	Proportion of commuters	Non-agricultural wage-earners	Complex index
		supply index (supplied with the above) expressed in percentage of the average city											
Máriapócs	1993	82,5	86,0	95,6	81,3	10,2	0,0	0,0	66,7	93,2	191,5	72,4	291,7
Soltvadkert	1993	114,1	73,2	105,9	93,3	32,6	0,0	0,0	160,4	125,5	32,2	60,9	292,6
Sajószentpéter	1989	89,0	109,8	102,7	88,1	156,5	0,0	0,0	66,1	50,7	53,5	121,9	295,7
Mindszent	1993	113,7	121,2	126,2	106,9	47,5	0,0	0,0	76,8	124,1	20,0	93,8	296,1
Dabas	1989	97,8	83,1	109,8	70,4	44,9	0,0	107,2	140,8	86,5	75,5	88,4	296,3
Sárbogárd	1986	97,2	68,3	127,6	85,1	143,3	0,0	0,0	81,1	81,9	81,0	102,7	297,6
Téglás	1991	87,1	69,9	136,6	109,1	130,5	0,0	0,0	52,1	57,9	121,0	93,3	299,1
Simontornya	1995	110,3	79,6	0,0	91,4	66,3	0,0	0,0	82,8	125,3	148,8	119,7	300,5
Mezőberény	1989	104,7	112,4	117,8	117,6	96,3	0,0	93,4	85,0	57,6	26,9	100,4	301,0
Kunhegyes	1989	103,6	92,3	115,7	111,0	78,9	69,2	91,3	82,6	90,4	61,2	91,5	302,4
Nagyhalász	1993	87,1	70,1	114,4	97,7	179,5	0,0	0,0	64,6	59,8	59,7	114,9	303,0
Hajdúhadház	1991	85,7	129,6	124,0	108,6	12,5	0,0	120,0	44,1	35,9	121,1	93,3	304,1
Balmazújváros	1989	91,0	94,9	133,3	137,6	83,9	0,0	111,5	74,2	85,3	11,1	78,4	304,2
Kistelek	1989	117,5	68,5	148,8	92,8	55,9	0,0	92,2	112,1	83,2	66,3	99,6	307,7
Szabadszállás	1995	124,6	77,8	138,0	75,6	0,0	95,8	147,8	77,2	69,3	16,5	79,5	307,8
Bátonyterenye	1989	106,8	104,4	71,5	115,6	121,3	0,0	66,9	74,5	52,8	131,1	119,0	315,7
Biharkeresztes	1989	102,9	117,7	120,2	86,2	36,1	0,0	83,1	83,1	79,2	147,1	103,4	316,3
Nagykáta	1989	105,0	147,2	123,5	112,0	24,3	0,0	62,7	90,6	80,8	95,5	112,6	318,7
Tiszafüred	1984	102,5	100,5	116,2	100,9	113,7	0,0	131,3	88,7	81,9	32,8	108,3	319,1
Kiskunmajsa	1989	109,9	116,9	121,6	99,7	45,2	0,0	103,0	105,7	144,3	37,9	77,8	320,3
Mezőcsát	1991	99,2	86,0	197,7	102,8	45,4	0,0	118,9	79,9	74,3	32,4	92,6	323,4
Lőrinci	1992	105,7	85,4	110,3	146,2	59,4	0,0	0,0	60,8	79,5	160,7	119,1	324,9
Tamási	1984	110,5	118,2	0,0	100,7	90,6	0,0	90,3	128,2	122,9	120,1	93,6	327,7
Átlagváros		100	100	100	100	100	100	100	100	100	100	100	331,7
Csepreg	1995	96,8	138,4	123,3	96,8	148,5	0,0	78,7	114,7	69,8	63,9	85,6	332,8
Mezőkovácsháza	1986	109,5	98,1	113,1	107,9	88,7	0,0	113,8	105,6	128,0	83,2	98,3	333,1
Pécsvárad	1993	94,8	82,9	95,4	43,6	73,4	0,0	0,0	138,7	142,6	169,4	102,5	333,2
Zalaszentgrót	1984	102,4	91,0	108,9	150,4	65,3	0,0	107,2	109,2	127,1	59,0	104,6	333,9
Abony	1993	101,7	98,5	104,0	98,0	130,2	0,0	199,2	74,3	53,3	11,2	101,7	340,5
Bátaszék	1995	97,2	111,7	135,8	116,2	94,6	0,0	113,7	106,6	78,3	110,4	103,6	340,8
Pétervására	1989	100,0	130,3	112,9	79,6	0,0	0,0	105,6	96,0	76,1	186,0	108,6	344,4
Tiszakécske	1986	111,0	117,8	103,8	113,9	44,7	0,0	110,4	111,4	188,7	18,5	96,9	349,2

Name of the city	Year	With dwellings	With public lights	With piped gas	With public water conduit	With public sewage network	With hospital beds	With secondary school classrooms	With enterprises	With catering outlets	Proportion of commuters	Non-agricultural wage-earners	Complex index
		supply index (supplied with the above) expressed in percentage of the average city											
Fertőd	1995	84,8	49,9	70,5	73,4	17,3	0,0	113,9	136,5	148,5	205,6	83,2	351,0
Aszód	1991	97,4	91,1	102,6	99,7	102,2	0,0	121,1	103,0	120,0	146,2	118,4	351,8
Ráckeve	1989	100,8	109,4	70,7	106,8	55,0	0,0	111,0	147,7	114,1	167,4	86,2	352,4
Encs	1984	86,5	91,4	0,0	89,4	156,5	0,0	119,6	97,0	120,8	160,9	110,9	353,3
Heves	1984	96,7	122,9	118,5	114,1	194,1	0,0	86,1	90,0	82,8	75,2	102,8	357,5
Balatonalmádi	1989	118,9	85,4	45,8	65,2	130,8	0,0	85,4	188,4	130,2	92,3	122,0	357,8
Füzesabony	1989	99,4	117,4	123,2	117,5	58,0	0,0	80,0	99,2	74,2	198,0	111,1	359,6
Vasvár	1986	105,8	238,1	0,0	89,3	68,9	0,0	85,1	114,4	100,1	115,6	95,2	365,2
Bicske	1986	94,2	103,4	38,3	131,5	172,3	0,0	119,6	94,2	87,3	150,5	113,4	366,5
Tab	1989	98,4	125,5	0,0	76,8	142,9	0,0	72,8	119,7	117,9	206,0	115,5	375,6
Tokaj	1986	98,8	117,3	90,1	107,3	115,9	0,0	88,0	93,7	198,6	122,7	116,2	375,6
Putnok	1989	91,7	74,1	79,4	97,4	162,3	0,0	101,0	59,0	29,4	252,4	117,1	384,7
Rétság	1989	101,7	68,7	62,0	161,7	53,4	0,0	0,0	139,9	118,9	234,3	110,1	385,6
Tolna	1989	99,2	91,2	149,0	124,1	200,5	0,0	138,4	115,7	67,7	68,4	112,9	388,0
Baktalórántháza	1993	85,9	80,6	147,6	104,4	109,2	0,0	72,9	72,5	112,4	242,9	103,3	389,1
Mórahalom	1989	112,3	97,6	183,1	102,7	260,0	0,0	0,0	95,5	59,0	33,9	74,9	391,4
Tiszalök	1992	100,9	113,0	149,6	203,2	91,6	0,0	123,5	73,4	137,8	118,3	104,7	399,4
Szigetszentmiklós	1986	101,5	166,1	127,1	137,9	143,9	0,0	91,6	156,6	77,0	182,8	115,2	423,4
Letenye	1989	85,3	109,4	124,0	112,1	314,5	0,0	0,0	96,0	117,1	108,6	105,4	438,0
Szerencs	1984	99,6	130,4	180,5	73,0	86,1	0,0	100,4	95,9	59,7	301,8	110,3	445,3
Dorog	1984	63,1	137,6	89,4	212,8	244,7	112,4	111,1	66,7	61,7	226,9	123,8	486,0
Mór	1984	96,7	126,6	109,2	82,5	94,3	401,4	75,8	85,6	46,1	73,4	109,2	496,6
Szécsény	1986	101,4	136,7	112,1	222,4	282,3	0,0	144,4	113,0	82,4	180,3	106,0	504,8
Szeghalom	1984	100,3	127,2	141,3	149,0	75,7	379,8	93,8	88,4	97,4	104,9	99,7	515,2
Balatonboglár	1991	114,4	119,1	105,9	59,6	152,3	0,0	142,7	184,2	155,3	339,1	94,3	517,2
Mezőhegyes	1989	121,0	187,4	196,2	157,6	97,9	354,8	96,2	62,5	85,7	108,6	38,4	531,4
Budaörs	1986	98,3	124,2	133,2	97,6	324,4	0,0	93,1	227,2	97,7	240,1	114,6	546,1
Pásztó	1984	104,7	104,3	113,8	111,2	54,0	451,8	146,6	148,8	90,4	121,6	106,9	576,4
Kisbér	1986	98,0	80,3	153,3	161,5	17,6	479,5	141,9	106,9	66,1	125,6	99,1	597,9
Gárdony	1989	100,5	101,4	104,9	111,1	172,1	0,0	0,0	130,7	509,7	95,1	89,8	606,1
Sásd	1995	97,2	96,0	0,0	154,8	499,1	0,0	146,6	124,7	78,7	201,7	98,4	620,8
Szentgotthárd	1983	89,3	171,8	120,4	108,4	174,0	488,7	117,9	93,5	110,7	171,5	112,8	640,2

Name of the city	Year	With dwellings	With public lights	With piped gas	With public water conduit	With public sewage network	With hospital beds	With secondary school classrooms	With enterprises	With catering outlets	Proportion of commuters	Non-agricultural wage-earners	Complex index
		supply index (supplied with the above) expressed in percentage of the average city											
Zirc	1984	97,5	120,5	0,0	189,0	362,5	413,6	104,0	121,3	71,4	79,2	104,5	640,3
Martfű	1989	95,4	141,6	115,0	149,9	472,1	0,0	85,1	87,1	54,6	303,5	115,4	641,1
Edelény	1986	86,2	81,4	103,8	107,8	123,5	638,8	144,2	73,1	64,9	82,6	106,5	712,9
Nyergesújfalu	1989	92,7	107,5	84,9	127,3	639,4	0,0	124,8	107,1	84,0	163,3	123,7	727,0
Balatonlelle	1991	113,3	146,0	62,8	114,7	299,7	0,0	0,0	192,4	635,2	339,0	94,3	839,9
Záhony	1989	95,6	162,0	171,0	273,8	509,9	0,0	84,8	85,5	73,6	720,4	124,0	976,6
Fonyód	1989	107,4	126,9	53,3	113,8	103,6	0,0	92,1	212,2	885,5	267,6	103,6	987,0
Balatonföldvár	1992	121,9	173,1	82,5	133,7	395,4	0,0	0,0	233,9	988,5	326,9	116,8	1174,0
Sümeg	1984	96,5	176,0	123,9	180,1	238,6	1261,3	123,5	116,1	114,0	182,9	106,8	1350,0
Szikszó	1989	93,2	101,2	140,7	116,1	67,3	1558,0	128,7	75,8	77,3	79,0	110,9	1590,9
Nagykálló	1989	91,2	87,8	87,8	87,0	77,5	1624,0	93,1	88,4	80,1	73,9	104,0	1647,3
Héviz	1992	122,1	134,8	126,2	92,3	125,4	3743,6	130,5	264,8	607,8	416,0	117,6	3838,1

The supply indices defined above bear the following significant features:

1. Supply indices regarding one single criterion provide the same grade of development in relation to the cities studied like the corresponding intensity ratios, since the supply index regarding any city with the exception of the permanent $\frac{\sum_{i=1}^{n} q_i}{\sum_{i=1}^{n} a_{ik}}$ factor corresponds to the intensity ratio, to $\frac{a_{ik}}{q_i}$, or – if the intensity ratio is $\frac{q_i}{a_{ik}}$ – to its reciprocal value. (This statement is easily justifiable with the elementary propositions concerning inequalities!)

2. In case a change occurs in the number of settlements subject to the study, the indices of the recently introduced or omitted cities will not influence the ranking order of supply of the cities already ranked during the investigation. (They will definitely modify the numerical value of the supply indices and the complex index, but will not alter the order of priorities among the cities!) This characteristic feature of the supply indices originates from the fact that the place of the city in the ranking list of development is decided by the $\frac{a_{ik}}{q_i}$ factor, which is independent from the data of the other settlements under investigation, while the $\frac{\sum_{i=1}^{n} q_i}{\sum_{i=1}^{n} a_{ik}}$ factor reflecting change is present in the supply indices of every settlement, and consequently will not alter or influence their ranking list.

According to the results of the study the complex index of the average city is 331,7, which means that in the list of the cities ranked according to the value of their complex indices the average city is situated between Tamási and Csepreg, 52 cities precede it in the list and it is followed by the complex indices of 52 cities. Nádudvar and Gyomaendrõd have the lowest complex index values: below 250, while 50 cities are scaled between 250 and the average city. The dispersion of cities with complex index values higher than the average city is considerably larger: there are 25 cities between the average city and 400, 12

cities between 400 and 600, 8 cities between 600 and 900 and the complex index of 7 cities is above 900, these cities are:

Záhony	976,6
Fonyód	987,0
Balatonföldvár	1174,0
Sümeg	1350,0
Szikszó	1590,9
Nagykálló	1647,3
Hévíz	3838,1

The indices of the latter 4 cities were primarily increased by the abundant hospital supply, but in the case of Hévíz the supply of public utilities, the level of catering networks and the proportion of commuters are also very high. In cities at Lake Balaton the index is raised by the catering network and the ratio of commuters, in Záhony it is the ratio of commuters that is especially high. In the case of cities with the lowest indices it is the lack of hospitals or secondary schools, or the overcrowdedness of the latter, the low level of public utilities and consequently the poor presence of entrepreneurs and catering outlets, the less attraction are the factors that shape the value of the index.

I only examined the ranking order among the 104 new cities that have been formed between 1983 and 1995. Even from this examination we can draw the conclusion that among these cities there are several, which well deserve the status of the city, there are others the legal status of which can be justified, but quite a number of them fall far behind the criteria of urbanisation.

As a next step it would have been necessary to compare these new cities with the old network of cities of the country. As such a study would have doubled the amount of work with collecting and fixing data, I did not tackle more than randomly selecting from among the old cities 11 smaller ones with their population not exceeding 30000. It was not my intention to compare the new cities with the most developed Hungarian big cities. The date of being granted the legal status and the number of population of the selected 11 cities are as follows:

Table no.3

Name of the city	Legal status given in	Number of population
Ajka	1959	32944
Celldömölk	1978	11865
Esztergom	before 1900	28268
Hatvan	1945	23927
Komárom	before 1900	19728
Kőszeg	before 1900	11716
Mátészalka	1969	18478
Nagykőrös	before 1900	26564
Sárospatak	1968	14889
Szarvas	1966	18406
Tapolca	1966	18391

The supply indices compared to the average city of the 11 cities would only demonstrate the order of the 11 cities, but would not be suitable for the comparison with the 104 new cities. Therefore I applied a standardization process and defined the supply indices by dividing the intensity ratios of the 11 cities by the parameters of the average city calculated from the 104 cities. These are presented in Table no.4 below, where the complex indices are also presented in the last column.

The supply indices and the standardized complex index of the 11 cities*

Name of the city	With dwellings	With public lights	With piped gas	With public water conduit	With public sewage network	With hospital beds	With secondary school classrooms	With enterprises	With catering outlets	Proportion of commuters	Non-agricultural wage-earners	Complex index
	supply index (supplied with the above) expressed in percentage of the average city											
Ajka	97,4	185,5	77,3	151,8	144,9	492,4	77,3	97,0	90,0	116,2	121,8	623,1
Celldömölk	102,2	479,0	114,1	99,1	94,9	230,9	83,7	84,2	70,0	152,1	117,2	617,1
Esztergom	102,6	159,5	97,7	92,3	114,2	671,8	92,6	142,9	213,9	93,6	121,6	785,3
Hatvan	100,3	99,0	95,0	87,2	46,0	582,6	73,5	101,8	100,5	124,9	116,0	658,0
Komárom	100,9	91,7	87,1	105,5	194,4	287,0	109,7	125,9	174,3	91,9	106,3	485,2
Kőszeg	95,6	228,7	95,0	130,8	179,9	0,0	91,0	91,7	118,6	88,2	121,4	416,1
Mátészalka	96,5	191,1	94,1	113,7	290,9	805,4	81,5	123,1	112,8	284,4	115,6	964,2
Nagykőrös	99,0	150,8	93,1	51,4	75,1	137,5	81,1	88,0	56,1	24,0	104,5	312,0
Sárospatak	92,8	162,2	0,0	131,0	183,7	0,0	90,8	90,3	117,2	122,3	102,2	376,0
Szarvas	109,9	108,5	130,4	129,6	265,3	51,3	106,4	141,2	135,3	73,9	92,3	440,7
Tapolca	96,3	120,3	66,2	126,4	122,1	337,6	102,6	126,9	70,0	97,6	114,3	476,6

* Magyarország városai, (The Cities of Hungary) Budapest, ÉGISZ Kiadó, 1996.

We can state that the complex indices of all the cities except Nagykőrös are higher, than that of the average city, but there is not as much diversity as among the new cities. Out of these cities Mátészalka has the highest complex index, 964,2, which is not only far from that of Hévíz, but does not even attain the complex indices of Balatonföldvár, Sümeg, Szikszó and Nagykálló. The complex indices of nearly all the cities were increased by the supply of hospitals, except for Kőszeg and Sárospatak, where there are no hospitals and Szarvas, where the number of hospital beds is low. All of them are above average as regards public lighting, except Hatvan and Komárom, which are also close to the level of the average city in this respect. It seems that the supply of public utilities did not improve as much in these old cities as in those new ones, where the whole system of public utilities was developed at the same time, on the account of being granted the legal status of a city. The supply of classrooms in most of these cities does not exceed the average, while their secondary schools provide educational opportunities for the students living in the neighbouring areas as well. The number of enterprises is either around or above average, the supply of catering outlets is fairly high in Esztergom, Komárom, Kőszeg, Mátészalka, Sárospatak and Szarvas, in the other five cities it is either average or low. The proportion of commuters reflecting attraction, and non-agricultural wage earners expressing urbanization is high in almost all of the cities.

Finally, I would like to draw the conclusions of this modest study, partly for scientific reasons and partly to help those, who organize the administration of regions and local authorities. I think it would be of much use to carry out such an investigation including all our cities, so that we could get a clear picture of their ranking order regarding their degree of development and supply based on measurements. The circle of indices should be extended and the supply of health-care and cultural services should be measured with a bigger variety of indices. An investigation should be made as to what other indices are needed in addition to the traditional indices used to measure the degree of development, the gathering of which could contribute to the effectiveness of regional data acquisition. The results of the investigation carried out might make it possible that, during the process of granting settlements the legal status of a city, the criteria of this process – discussed in the introductory chapter of the volume entitled The Cities of Hungary published in 1996 – could be applied with a more careful elaboration of basic information, and with the further improvement of the measuring methods, all laid down in a provision of law. This way, the influence of lobbies competing with each other to gain the legal status could also be limited.

SUMMARY

Ranking of the Cities Recognized between 1983 and 1995 by their Grade of Development

KATALIN NAGY KOVACSICS

Measuring the level of urbanization of towns has been for long a difficult task of urban statistics and urban sociology. There is no international consensus on what to call a town. In Hungary, a settlement is called a town if it is legally declared one. However, there are big differences, since some of the towns, which have been legally declared towns show only few signs of urbanization. Measuring urbanization is timely nowadays, since the number of towns has soared during the past two decades. In the early twentieth century, there were only fourteen towns in Hungary, and merely ten additional settlements were granted town status in the subsequent fifty years. By 2004, their number has leaped to 252. This dramatic rise poses the question to what extent are those new towns urbanized. To answer the question, I used a complex index for my calculations. As a first step, I calculated the intensity indices of the selected towns, what enabled me to define an „average town." This is a hypothetical town, where every index is the weighted mathematical average of the intensity indices from the towns selected. The intensity indices show the ranking of the towns along each criterion, but they are unfit for summarizing, since they are expressed with different units of measurement. In the following stage I defined the supply index of each town in the survey along each criterion in the following way: I divided the intensity index of the town concerned by the corresponding intensity index of the „average town", and then multiplied the quotient by 100 to receive the result in percentage. Finally, I calculated the complex indices of the towns in the following manner: I considered the supply indices to be a vector-coordinate, and the length of the vector (the square root from the sum of the squares of the supply indices) as being the complex index.

Let us hope that this measuring method will be incorporated into the legal process of granting town status. That could help reducing the role of lobbying in the drive for acquiring town status.

RESÜMEE

Rangfolge der zwischen 1983 und 1995 gegründeten neuen Städte ihrem Entwicklungsgrad nach

KATALIN NAGY KOVACSICS

Ein altes, immer wieder zurückkehrendes Problem der Städtestatistik und der Urbanistik ist es, wie der Entwicklungsgrad, die Verstädterung einer Stadt gemessen werden kann. Der Begriff „Stadt" wird in jedem Land anders definiert. In Ungarn werden diejenigen Siedlungen „Stadt" genannt, welche über die Rechtsstellung einer Stadt verfügen, also durch eine Rechtsbestimmung zur Stadt erklärt worden sind. Es gibt natürlich große Unterschiede, denn es gibt Städte, die verwaltungsmäßig Städte sind, aber ihre Entwicklung nur bescheidene städtische Merkmale aufweist.

Die Untersuchung des Entwicklungsgrades der Städte ist deshalb aktuell geworden, weil in den letzten zwei Jahrzehnten die Zahl der Städte plötzlich zugenommen hat. Am Anfang des 20. Jahrhunderts gab es auf dem Gebiet Ungarns insgesamt 14 Städte, und in den darauf folgenden fünfzig Jahren erhielten auch nur zehn weitere Städte den Rang einer Stadt. 2004 belief sich die Zahl der Städte schon auf 252.

Diese rasante Zunahme der Zahl von Städten wirft die Frage auf, ob und in welchem Maße diese neuen Städte städtisch sind. Um die Antwort auf diese Frage zu finden, habe ich einen komplexen Index verwendet. Ich ging vom Ausrechnen der Intensitätskennzahlen der ausgewählten Städte aus. Auf dieser Grundlage definierte ich aus den Daten der untersuchten Städte die „Durchschnittstadt". Diese ist eine theoretische Stadt, deren Kennzahlen den gewichteten mathematischen Durchschnitt der Intensitätskennzahlen der untersuchten Städte darstellen.

Die Intensitätskennzahlen zeigen uns zwar die Reihenfolge der Städte innerhalb eines Kriteriums, sie ermöglichen aber keine Summierung, weil sie mit unterschiedlichen Einheiten messen. Im nächsten Schritt legte ich die Versorgungskennzahl aller Städte bezüglich aller hinzugezogener Kriterien fest. Das geschah folgendermaßen: Ich teilte die Intensitätskennzahl durch die entsprechende Intensitätskennzahl der „Durchschnittstadt", und den Quotienten multiplizierte ich mit hundert, um das Ergebnis in Prozenten zu bekommen.

Und schließlich definierte ich die komplexen Indizes der Städte, indem ich die Versorgungskennzahlen als Koordinaten eines Vektors nahm, und die Länge dieses Vektors (die von der Quadratsumme der Versorgungskennzahlen gezogene Wurzel) betrachtete ich als den komplexen Index.

Die Ergebnisse der Untersuchung sind vielleicht geeignet, im Zuge der Erklärung einer Siedlung zur Stadt angewendet zu werden, wenn die Methoden der Messung und die Kriterien der Entwicklung in einer Rechtsnorm verankert werden. Dadurch könnte die Rolle von Interessen verschiedener Lobbies bei der Städteentwicklung eingeschränkt werden.

CAUSALITY AND DETERMINATION IN THE WORLD OF QUANTUM MECHANICS AND CRIME

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Preface

It might seem surprising for a criminologist to elaborate his thoughts on the regularity of crime under such a heading and in such a context. This unusual phenomenon roots in the fact that my favourite secondary school subject was physics, and that my goal as youth was to become an electrical engineer. After passing my final examinations, I applied for admission to the Technical University. However, as a result of Hungary's strict implementation of its planned economic policy, I was redirected to the Faculty of Law at Eötvös Loránd University in 1950, since there had been an overapplication to the Technical University, and only 42 applications had been received for 250 spots at the Faculty of Law.

As a student of law interested in the world of physics, I found the most intriguing first-year subjects to be statistics and criminal statistics. The late Dr. Ede Theiss also played a significant role in awakening this interest. He was the head of the Department of Statistics at the time. I became a student assistant of the Department of Statistics during my second year as a student. Professor Theiss obtained his scientific degree as an electrical engineer and economist in the USA. Thus, understanding my problems in connection with modifying my career, he asked me to work as a teaching assistant of the Statistical Department. This way I could participate in various research projects, including research aimed at determining the causes of juvenile delinquency.

These years determined the direction of my interest. My dissertation for candidacy bears the title „Juvenile Delinquency and Society", which I defended at the end of my aspirantura in 1962, in Moscow. My doctoral dissertation is entitled „Causality, Determination and Prognosis in Criminology", and I defended it at the Hungarian Academy of Sciences in 1975.

Taking into consideration my interest in physics, even today I still pay attention – if only superficially – to developments in this area of science, its extraordinary discoveries and the way its new realisations are put into practice. In recent

decades you can often hear about Ede Teller in Hungary as well, about the excellent physicist, who proved to be an outstanding scientist not only in the field of physics, but also in the fields of biology and chemistry.

In 2003, Attila Vincze published a biography about Ede Teller, about the life of one of the polyhistorians of our era under the title „Ede Teller – The scientist and his world"[1]. Reading this book I realised that my ideas about causality, determination were not quite the same as those of Ede Teller, which could – of course – be the result of inadequancies in composition or in translation. After some months of reflection, I decided to elaborate my views on the different evaluations concerning the determinist relations prevailing in the world of quantum mechanics and crime. I feel that I have to rephrase the place of causality, of determination, their role in human behaviour, but especially in criminal human behaviour. Once again I have to direct attention to the role of *determination, causality, regularity and chance* in crime.

This paper seeks to convince the reader that the above-mentioned concepts reflect the existing reality, they are indispensable creative elements of human behaviour, even if the relations have different characters in the world of atoms, since the parts of the universe do not necessarily operate according to uniform regularities.

1. The interpretation of determination

The concept of determination is often substituted in the Hungarian language as well by the expression of determinate or determined, which unquestionably refers only to the past and it is not valid for the future. Expanding the concept of determinated to the future means predetermination, determination in advance in reality, as if even now in the present the events of the future would also be determined. It is, of course, true that determinism, determination will also have effects in the future, when with the passing of time the future events yet imagined today stepping over the moment of the present become the past, since *all phenomena that have already happened, that already belong to the sphere of the past are already determined, becoming definite but the expected and nonexpected events of the future have not been determined yet, they are only in the process of becoming determined, and we cannot foresee precisely how they will be determinated, we can only predict the realisation of the events of the future in accordance with the regularities of causality, our knowledge, and relations.*

[1] Vincze Attila Tamás: Teller Ede – A tudós és világa. Pallas, Gyöngyös, 2003.

Consequently, the knowledge of the past is very significant, especially that of the recent past, because it is mainly in this sphere that we can find those regularities, those cause-causality relations that enter the future and render the events of the future likely. The new discoveries, new information and the growth of knowledge provide a better understanding of the past, they predict the limitations of the future and its likely events in a wider aspect.

I have found it necessary to present my point of view about determination to understand Ede Teller's way of thinking better. He is considered to be an excellent expert, scientist of quantum mechanics, the father of the hydrogen bomb. In his book entitled „Twentieth century journey in science and politics"[2] Ede Teller wrote that: „the theory that quantum jumps have only statistical probability but are unpredictable, is an absolute contradiction to the deterministic, clockwork precision view of the reality. One of the consequences of quantum mechanics is that the future becomes really uncertain. Determinism is a myth. A much more unusual theory takes the place of causality. A solitary atomic event cannot be predicted, because in the dual world of waves and atoms an event cannot be totally described in a deterministic way. „The central theory is that the past is a different reality from the future. The events of the past are always compatible with causality. However, the present cannot be known well enough to give a clear prediction with regard to the future"[3].

The book referred to, as well as the quoted sentences, give an indication of Ede Teller's point of view concerning determinism. My detailed point of view can be found in my dissertation[4]: „Causality, Determinism and Prognosis in Criminology", and in the textbook: „Fundamentals of Criminology"[5]. Thus, I argue only briefly in defence of my point of view with regards to determinism, and I seek only to clearly outline the most important arguments.

Above all, I would like to prove that *determinism is not a myth*, in opposition to Ede Teller's point of view. (The following words about the *concept of myth* can be found in the dictionary of foreign words: „comprehension, tale, legend that enlarges the actions of an individual or a society into supernatural")[6]. In my opinion, *determination, determinism is a real process, during which the phenomena are formed: the realised phenomena belonging to the sphere of the past are already determined, those of the future will become determined, when*

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2 Teller Ede: Huszadik századi utazás tudományban és politikában. Huszadik Századi Intézet, Kairosz Kiadó. Akadémiai Nyomda, 2002.

3 See foot-note: n. 2., pp. 66-67.

4 József Vigh: Causality, Determinism and Prognosis in Criminology. Akadémiai Kiadó, Budapest, 1986.

5 Vigh József: Kriminológiai alapismeretek. Nemzeti Tankönyvkiadó, Budapest, 1998.

6 Idegen szavak kéziszótára, 1960. (Dictionary of Foreign Words)

with the passing of time they reach the moment of the present. I fully understand Ede Teller, who lived in the world of quantum mechanics, who strived for the recognition, knowledge of the quantummechanical relations, regularities and put them into the following words: „One of the consequences of the quantum mechanics is that the future really becomes uncertain and in the dual world of the waves and atoms a happening cannot be described in a totally deterministic way"[7]. I agree with the part of the quoted sentence that relates to the uncertainty of the future events. This uncertainty, however, stems from the lack of our knowledge and information, and not from the lack of determination. There are quite a few such phenomena, which we can predict in advance, that can be realised with 100% certainty. The future is the territory of probabilities and possibilities. Even the nearest future cannot be made probable with precision. For instance, a man with a heart problem can die at any moment in the future, when his heart stops beating. It seems for me that the lack of our knowledge is characteristic not only for the future, but also for the past. In other words, even *the society based on knowledge means only that we can draw up the past precisely with greater knowledge, and we can predict the formation and the development of the future with greater probability.* The outline, the likeability of the future, the increase of the probability rate depend, of course, also on which phenomenon is in question. The already well known phenomena can be predicted with greater probability, than those of the newly recognised relations and their results. *One of the basic tasks of science is to predict the future determination of the phenomena with as great a probability as possible.* Predicting the future depends greatly and primarily on our knowledge of the regularities of the already determined phenomena of the past.

I would also like to reiterate the thoughts of Ede Teller in the following sentence, where he states that: „One of the consequences of quantum mechanics is that the future becomes really uncertain"[8]. Since I am a layman in the field of quantum mechanics, I can only interpret the above-mentioned sentence with great difficulty. If this sentence means that the recognisable regularities in the circle of atomic parts can create uncertainty with regard to knowledge of the future, the whole world and even the whole universe then it should be deemed as a sad predictive statement, but there is also the possibility that the sentence is either inaccurately worded or translated. I trust science, I warmly welcome the pursuit for the creation of a knowledge-based society. It is true, however, that the results of scientific research can be abused, they can be used for harming humanity. One should recall, for instance, the devastation caused by the nuclear bombing of Hiroshima and Nagasaki. Or let us consider the hydrogen bomb, the active force of which is a thousand times more effective than that of

[7] See foot-note: n. 2., p. 67.
[8] See foot-note: n. 2., p. 66.

the nuclear bombs that were dropped on Japan. By witnessing the horrific devastation caused by the nuclear bomb, human wisdom has only placed them on the alert to avoid outside attacks from taking place.

To make the Teller type of worldview more comprehensible, it is advisable to quote his following statement: „Relativity seems incomprehensible as it questions our concept of time, it points to the fact that we cannot talk about time independent of space. This concept surpasses our direct sensing ability. The other new development is that quantum mechanics denies the mechanical, predictable structure of our universe that we had considered true until that time, and advances the conclusion that we can only state probabilities as regards the future.

The theory of relativity and quantum mechanics made it necessary to reevaluate human thinking. Significant time and effort are needed until the world of physics changes in the human mind. If we recognised the relativity of time and the uncertainty of the future in a wide circle, we might be able to acquire an unusual, but more precise picture of the world. For most people, however, and even for numerous white collar workers, these new types of concepts are hard to come to terms with and generate uncertainty"[9].

The quoted thoughts so far outline well, and hopefully at least indicate, Ede Teller's view of the world and his phylosophical attitude. Ede Teller was also aware of the fact that the theory of relativity and the new recognitions of quantum mechanics are difficult to comprehend for humankind. I share the view that these concepts can significantly alter our picture of the world and they prove that we can only value the future as probability. In the field of social sciences the concept according to which the future can only be viewed as probability has been in existence for more than a century and it has been quite widespread. However, in most people's minds in everyday life, the old concepts classified by science as out-of-date and unreal still powerfully live on. For instance, today the heliocentric view of the world recognised by Copernicus is already natural, it is not the Sun that revolves around the Earth, but the Earth that revolves round the Sun. Nevertheless, even everyday language maintains the expressions of the geocentric view of the world. For instance, the sun rises, the sun sets. The struggle of the deterministic worldview with the various religious concepts, with the different principles worded in them is also significant.

[9] See foot-note: n. 2., p. 561.

2. The interpretation of past, present and future

The real interpretation of determination is closely connected to the proper definition of the process of time. You can but absolutely agree with Ede Teller's references and indications concerning the past and the future. What is not clearcut in his ideas is the concept of „the present" that plays part in the passing of time, in the line of time. The following can be read in his already quoted book: "However, the present cannot be known well enough to give an unambiguous prediction about the future"[10]. It seems from the text as if the present had an expansion just like the past and the future. In the everyday valuation it is truly a general concept that the present has an expansion just like the past or the future, that it contains a period, a time span. In fact, this concept covers the events and period of time of the near past and near future, when considering the expansion of the present, although nobody has been able to mark the starting and finishing point of the present so far. Moreover, in reality, when something has happened even if only yesterday, even a minute or a second ago, already belongs to the sphere of the past. In the same way, the phenomena that have not happened yet, no matter how near they are to the present, belong to the sphere of the future. *It can be deducted from all these that the present has no extension, it is a moving borderline or point between the past and the future, that changes its place on the axis of time with the passing of time, between the „increasing" past and the „decreasing" future.* In the case of phenomena with contents defined in time – e. g. human life – the passing of time increases the time content of the started existence and decreases the time of the expected existence. According to our present knowledge, the starting of the past originates from the infinite and the future leads there as well.

There is no real causality relationship between the phenomena of the past and the future, since probable phenomena of the future do not have any causes yet, they will only have causes with the passing of time, when the future becomes past. Causality relationship exists only between cause and effect, effect is a realised consequence, thus it supposes a past time. *The past is the area of the causes-effects already realised in the past, as the future is the sphere of the possibilities, the probabilities.* The future, especially the near future, however, is composed of such real possibilities that in most parts are rooted in the past. In the possible events of the future usually the regularities of the causalities, the relations of the causality of the past are forecast and depending on the formation of the conditions, when the actual future becomes the past, these effects become causality factors themselves. This is how a lot of multilateral relations independent of time become a lot of unilateral determinations and definitions in reality, in the causality relation. The future phenomena of the present will be determined as they enter the sphere of the past.

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[10] See foot-note: n. 2., p. 561.

The textbook on criminology teaches university students that: „There is no real causality relation between the phenomena of the past and the future, since the probable phenomena of the future do not have any causes yet, they will only have causes with the passing of time, when the present future becomes the past. The causal relation exists only between causes and effects, therefore causality is a realised consequence, thus it supposes a past time. The past is the area of causes and effects, as the future is the area of possibilities and of probabilities. *The future, however, consists of such real possibilities that are rooted in the past.* In the possible events of the future the causality relations of the past are forecast, depending on the formation of the conditions, when the current future becomes the past, these effects become causal factors"[11].

3. The interpretation of the concepts of necessity, regularity and chance in the formation of phenomena

Every phenomenon that has already been formed or will be formed in the future, – when on the line of time the present future has already become the past – is formed or has been formed by necessity. The concept of determination obtains its form: that is *the phenomena of the past have already been determined by necessity and those of the future will be determined by necessity.*

The analysis of the regularity relationship asks for the examination of the question, whether in the case of repetition of the same causes and conditions the same causalities are created or not. According to the formal logic, the answer to this question can only be yes. If the totality and structure of the causes and conditions are repeated in exactly the same way, the causalities should also be the same[12]. In reality, however, due to the constant movement and change, the constellation of the causes and conditions rarely repeat themselves in an absolutely equal form in the process of the passing of time. This means that the constellation of newer causes and conditions is only partly identical and thus causality is also necessarily different.

Besides the imperative character of causality relations we have to differenciate between *regular* and *accidental* relations[13]. In case of repetition, a great number of phenomena among the necessary causality relations are such that they are often repeated, while others are rarely or are not repeated at all. The causality relations, which are essential, lasting and general, and which regularly occur from time to time in the case of repetition of phenomena are called *regular relations. Accidental relations*, on the other hand, are extreme causality rela-

[11] See foot-note: n. 5., p. 151.
[12] See foot-note: n. 5.
[13] Földesi Tamás: Az akaratszabadság problémája. Gondolat Kiadó, Budapest, 1965.

tions that occur only exceptionally. Consequently, the law of causality contains the essentiality, permanence and generality of the connection among the phenomena[14]. Contrary to this, *chances* comprise such phenomena, which are not present in our knowledge, or ideas related to events of the future, as well as phenomena whose realisation can only be expected by slight probability. The notion of accidents or chances can be explained by the following words: an unforseeable, unexpected event, a phenomenon without intention or will, an incalculable formation of events. In other words, accidents are phenomena, to which neither our attention nor our knowledge extend, we do not usually think about them, they are outside our conscience, or the possibility of their appearance seems to be insignificant. All these, however, do not mean that chances fall outside the concepts of necessity and regularity. In certain cases, chances can be present as significant causality factors, but this causality relation is usually a part, a forming element of another necessary relation. Ede Teller put this into the following words: „Chance is also regular". In his book entitled „Physics is splendid because it is simple", he devotes an entire subchapter to this topic under the heading „Statistical mechanics"[15].

I think it is worthwhile to quote from the above-mentioned book Ede Teller's few lines from the poem called „Poem without a title" from the point of view of valuting chances.

„To know: the mind is short, the will is weak,
That I depend on blind chance.
And with an obstinate hope still, still believe,
That what I do cannot be nothing."

I have reflected extensively and profoundly a lot about these four lines, but it is especially the thought „I depend on blind chance" that is still on my mind, and to this very day, I remain unable to fully agree with this sentence. In my opinion, the natural and social relations surrounding us have all their own regularities, and every person acts in accordance with their given situation, genetical faculties, environment and knowledge, as well as personality. According to social development our acts are guided by the known environmental effects, the recognised regularity, knowledge to a greater and greater extent. The effects making us act and carry out deeds often go hand-in-hand with the effects of chances, and in such cases our ideas do not materialise, or at least not in the way we had previously planned. However, our ideas, our planned aims based on knowledge, usually materialise in a greater percentage. And if this reasoning is true, we are not totally dependent on blind chance. Even more so, since, as I have already mentioned, Teller shares the view that „chance is regular"[16], and it is only the causality of the unknown, the unexpected chain of causality.

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[14] Szabó András György: A törvény és az ember. Kossuth Könyvkiadó, Budapest, 1964.
[15] Teller Ede: A fizika nagyszerű, mert egyszerű. Akadémiai Kiadó. Budapest, 1993.
[16] See foot-note: n. 15., p. 89.

I have, of course, taken into consideration the fact that there are different expectations with regards to the wording of a scientific concept, where logic has to fully prevail, and writing a poem, a line of poetry expresses maybe a feeling of the moment, a temporary state. And here we have to bear in mind that Ede Teller, the great scientist, who further developed quantum mechanics, discovered new relations, felt that he was surrounded by new regularities and recognising, discovering these was to a significant degree due to chances. Undoubtedly, knowledge and belief, certainty and uncertainty, thoughts and feelings mingle here, and they can differ from the scientific, rational formulations.

Examining the relation of regularities and chance, I would like to refer to the fact that there exists a differing view of everyday life between the people who employ the already recognised and accepted knowledge, regularities in their work, and those who work on the recognition of regularities. In the world of new recognitions, the role of chances is always greater than in that of the already often used knowledge. The battle between the deterministic conception and the ideology of free will is a good example for this. At the beginning of the 19th century, the dominance of free will still existed even in the world of criminal justice. However, from the second third of the 1800s, when criminal statistical data proved that there are regularities in criminal human behavior just like in the field of natural phenomena, the deterministic concept, the prevelance of regularities gained more and more ground in the field of science. From this point on, it is a constant subject of debate in the theory of criminal law, what kind of jurisdiction is just and what kind of measures, punishments can withhold people from committing crimes. *In my opinion, the further humanity moves into the sphere of knowledge of the surrounding universe, the more the knowledge of regularities motivates human activity.*

I write these words only to provide self-encouragement in our everyday activities, in setting our aims and in striving to achieve them, to „believe", to trust in the fact that in our indicated activity knowledge and information can play a greater role than chances. I am convinced that it is derived from this line of thinking, from its background that the praisable and approvable initiation stems to establish a knowledge-based society.

Ede Teller's following thoughts underline all these. He put it into words in his book entitled „Twentieth century travelling into science and politics". „Human spirit can only flourish if we accept our imperfections. It is easy to see the imperfections of others, but it is often a misconception, an unjust conclusion. Obviously it is difficult to notice our own imperfection, but this ability is an important part of personal excellence. We can struggle to have fewer and fewer faults, but we have to accept the fact of how imperfect we are"[17].

[17] See foot-note: n. 2., pp. 567-568.

4. The prevelance of causality and determination in the field of crime and human behaviour in general

Beyond the general, on the level of the universal interpretation of causality and determination – for a better understanding – it is also necessary to evaluate the indispensable regular and accidental phenomena that come into effect in the society, in the sphere of the instinctive and conscious activities that appear in a person's life.

In this study we narrow down the evaluation of social phenomena – from the expert point of view – to the evaluation of crime and criminal human behaviour. I believe that the social image is formed through the evaluation of crime and by outlining the rules to guide general human behaviour. In fact, crime is such a part of social activity that acts by men are required to declare the illegality of this activity.

Until the second half of the 19th century, the dominant view in the field of crime and criminal justice was that people act on the basis of their own free will and that as a result, committing a crime is also the consequence of exercising one's free will. It was in accordance with this conception that the so-called classical criminal justice system was formed and became dominant at the turn of the 19th century, the theoretical basis was dominated by the concept of free will, the objective of criminal punishment and justice was seen in revenge and as its means proportional punishment was considered to be just.

It was Adolphe Quetelet, the Belgian moralstatist, mathematician, astronomer and playwright, a true polyhistorian, who first expressed his disaccord with these views, and introduced his own theory on determination also present in human, criminal behaviour, based on criminal statistical data acquired from Western Europe in the 1820s. Criminal statistical data was introduced in France in 1826. From this time on data concerning the operation of the bodies of justice, crime and criminals have been published annually. Quetelet studied the French criminal statistical data relating to the period from 1826-1831 in great detail.[18]Quetelet determined that *regularities rule in crime just like they do in other phenomena of society or in the world of natural forces.* Consequently, his followers considered him to be the father of criminology, the first person who recognised the regularities of crime – and we also regard him as the father of criminology.

[18] A. Quetelet: Sur l'homme et le developpement de ses facultes on essai de physique sociale. 1935.

According to Quetelet the causes of crime can be divided into two significant groups: one group is that of the *natural forces* that come into effect in the world of the animals and plants while the other group is that of the *social forces* – or using his words – of the perturbational forces, or the *disturbing forces* that stem from the moral and intelligent nature of man, and thus from the relations of social life. These two forces determine the commitment of criminal acts. The realised criminal human behaviour was thus determined, is determined, and that of the future will be determined, when from the sphere of the future with the passing of time it moves into the sphere of the past. According to Quetelet: „A man as a member of the social entity complies with necessity at every given moment and regularly pays his tax, but as a man, who makes use of all the forces of his intellectual abilities and so to say: 'rules' over these forces, changes their consequences and can strive towards a better future"[19].

It is clear from the above quotation that Quetelet is not the advocate of mechanical determination, since he accepts the mutual effect between man, nature and society surrounding him. According to Quetelet crime is not only a necessary factor of society, but it can also be stated that people commit crime in similar numbers and proportion year after year. Quetelet evaluated this factual situation as follows: „The fate of the human race is sad, because it is possible to calculate in advance how many people will cover their hands with the blood of their fellow men"[20]. In fact, it is possible today to estimate and predict with great accuracy how many murders will be committed in a defined area. In my opinion, however, the recognition of this regularity should not provide a reason for sadness. On the contrary, if we are able to more or less exactly pinpoint the number of the crimes to be comitted or other criminal acts, and indicate their causes, and if we can eliminate a significant part of these causes, then it can be expected that in proportion to the elimination of causes the number of crimes will decrease as well. However, a similar method can be used in the interest of decreasing the other non-desirable phenomena. It is evident from these thoughts that the exploration of the causes of the phenomena holds a significant social interest, because on the basis of the disclosure of these causes the formation of the phenomena in the future can be made probable. If we can increase the probable causes of the favourable phenomena and decrease those which are unfavourable, such as those of the criminal acts, then social development ensures an increase in the number of individuals that operate within the framework of legality (prosecution of the right).

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[19] A. Quetelet: Physique sociale on essai sur la developpement des facultes de l'homme. 1869.
[20] See foot-note: n. 19.

It can be stated from the preceding ideas that Quetelet's research proved that in the area of crime, regularities rule the seemingly accidental phenomena of social life just like in the field of natural phenomena. This recognition gradually spreads into the world of scientific knowledge. The trends of criminal anthropology and criminal sociology formed in the last third of the 19th century rejected the ideology of jurisdiction known as „classical" based on free will together with the aim of reprisal and punishment in proportion to the deeds. As theoretical basis of the new trend the determinist view, as the aim of justice, the prevention, and as its means individual punishment instead of the punishment proportional to the deed was formulated.

These so-called positivist, deterministic theses appeared mainly in developed European countries at the turn of the 19th and 20th centuries. Before the Second World War the significant representatives of national criminology and criminal justice, such as: Jenő Balogh, Albert Irk, Ervin Hacker, Rusztem Vámbéry, and many others, placed great emphasis on the causality factors that prevail in criminal human behaviour: personality, genetical skill, social conditions as basic determining factors. In the first two decades following the Second World War criminology as a science objectively evaluating crime and criminal human behaviour was not a compulsory subject at the faculties of law of national universities. Most of the knowledge in this respect was to be found in the subject of Statistics, because it dealt in a relatively great depth with the problems of criminal statistics.[21] Professor Ede Theiss, head of the Department of Statistics at the Faculty of Law of ELTE University personally examined in great depth the nature of crime, especially the problems of causality.[22]

One of the characteristics of the „present era", that is of the near past and near future (2-3 decades) is that crime has significantly increased and further increase or stagnation is expected. This serious criminal state and tendency is above all the consequence of those significant social changes that have come into effect in various countries and continents in recent decades. These harmful, undesirable criminal phenomena in most cases are not the forms of chances, but they are a series of conscious activities. For instance, the proportion of the known and intentional crimes has represented 98,6 – 98,9 per cent of all crime in our country in the last five years. Consequently, the proportion of negligent crimes has only been 1,4% – 1,1%.[23]

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[21] Dr. Theiss Ede: Igazságügyi statisztika. In: Horváth Róbert, Kovacsics József, Theiss Ede: Statisztika. Felsőoktatási Jegyzetellátó Vállalat. Budapest, 1959.

[22] Theiss Ede: A bünözés okainak statisztikai vizsgálata. Jogtudományi Közlöny. 1958. november-december.

[23] Tájékoztató a bünözésről. 2003. év. Belügyminisztérium Informatikai Hivatala és a Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Főosztálya. p. 33.

These data underline that regularities play a greater role in criminal human behaviour than chances. That is, crime as social mass phenomena is also the result of definite causes, basically it is the manifestation of conscious human behaviour. In the case of accidental effects, it happens that a strange or an unexpected accidental chain of causality enters our chain of causality of conscious intentional activities, in other words the formation of causality. Thus, to borrow Ede Teller's words „even chance has regularities", only it is a causality factor, or causality chain that falls outside the borders of our knowledge, of our information, as it is not expected and considered improbable.

5. Is the structure of causality and determination the same in physics and criminology?

When we investigate this topic, first of all it is necessary to establish a difference between the causality that prevails in the circle of inanimate objects and human beings. In the field of inanimate objects, natural phenomena rule the mechanical regularities, when the different objects influence one another. Contrastingly, or different from this, is the system of human relations, but especially in the field of criminology we examine the regularities of causality considering what kind of relations there are between the criminal human behaviour and personality, biological factors and social effects.

The working of the mind, the type of personality, the specifics of social existence play a decisive role in the individual activities of man and in the behaviours performed by human communities, the members of society. When criminology looks for the causes and conditions of criminal acts and crime, it examines the state of the personality as a first step, since the effects of the somatic and outside factors appear in it, and it is there that wishes, demands and activity goals and the means necessary to reach them are formed. It is clear that the human mind and the nervous system, the information accumulated in the brain and knowledge have a unique and decisive role in the causes of human activities. The more a man knows about phenomena surrounding him, about their correlation, the more he can make decisions that partly or totally satisfy his needs, wishes and demands. The aims to be achieved, to be carried out in the future – be it criminal or not – are based on the knowledge of the past, acquired knowledge, the biological, genetical faculty and the influence and inspiration of the social environment. Consequently, it is the personality as a direct factor in producing the willful decision that plays a decisive role in the formation of a criminal act (or any other activity).

After stating, knowing the state of personality, the psychology of the perpetrator and the relation of the realised criminal act connected with the personality, criminology usually examines the causality relations of the perpetrator's genetic, somatic factors as factors taking part in the formation of personality, in the determination of causality. Criminology also finds it necessary to examine the determinating effect of the social and natural factors beside the genetic ones. If we consider the personality's state directly prior to the committing of crime as a causality of the somatic and social, and the environmental factors prior to that, we can see that the crime as causality is determined through the so-called causality and cause-effect chains. And – if needed, we must familiarize ourselves with the evolution of these cause-effect chains in reverse to their genesis, probably to their conception, so that the causality scheme of the crime examined can be clear and easy to understand.

The examination of the cause-effect chains should include both criminal and non-criminal human behaviour. Society usually gives ground to several kinds of behaviour and activities. Thus, the norm offending and norm following behaviour arise as an alternative possibility for the individual. Every society has its own historically formed structure, and it operates relatively harmoniously if its substitute system, and within it also the responsibility system, follow the regularities operating in the society.

It seems to me that the set of questions, with regard to determination and free will, cannot be avoided from the view of responsibility either, since we arrive at a completely different conclusion, if we accept the determinist conception, as if we take the view of free will independent of the objective relations.

Among the circle of criminal experts many worry about the holding responsible system, the criminal justice realising the concept of determinism, because they are either the followers of indeterminism or they misinterpret determination and identify it with mechanical determination. Thus, I would like to emphasise that the mechanical determinism prevailing in the field of natural phenomena is not identical with the determination forming people's activities in society. The Quetelet type of recognition in this respect, namely that regularities rule in criminal human activities just like in the circle of natural phenomena, does not mean that these include identical determinational processes, since in the sphere of society and human behaviour personality and the conscious activity of the human being enter the objective effects. Nowadays it seems natural for a lot of people that crime is above all determined by social relations, and the personality determined this way validates the acquired information in carrying out his aims. According to the modern determinist conception, or more precisely the modern, sophisticated form of the determinist conception, which can also be applied in the circle of human activities, a person's environment offers various

possibilities for human activity, for the human choice, but at the same time it limits the frames of choice, and the person – so to say – can only choose from the possibilities. What a person chooses, however, that is the choice itself, which is determined just as any other phenomena. The choice is the originator of the effect of two groups of factors, namely the quality of the personality and the effect of the current, existing objective relation, which is the effect of the situation. The question, however, what kind of personality, knowledge, goals, or task solving skills a person has, and what kind of situation surrounds the person at a given time, it is the function, the causality of the objective relations of the past that have been determined through causality chains and mutual effects.

The autonomy or relative autonomy, or as it is called most often but inaccurately, the „relative free will" of the human activity is a basic question of the determinist conception. In our view and use of terminology the personality has a relative individuality as regards the current objective relations and the effects of the situation. We must not forget, however, that the way the personality reacts to external effects depends on the state and quality of the personality, on how the individual reacts to external effects. People with different personalities react in different ways to the same external effects, while those with similar ones react in a similar way. The way of reaction then is the function of the difference in personality beside external effects. A highly socialised personality even in case of favourable conditions will not commit a crime, since in this case the duty-like causes easily win the motivation battle – if present at all – prior to the decision of the will. At the same time, the personality with an anti-social conscious attitude can form them itself with the lack of crime committing conditions depending on the objective possibilities. Thus, the personality has no autonomy as regards the objective effects of the past, it has a relative autonomy in connection with the effect of the imagined situations of the future depending exactly on the effects of the past.

These statements necessarily raise the question as to what extent is the personality of our age autonomous. Taking into consideration the phylogenetical development of people, we can state that in the process of accumulating information and knowledge the autonomy expands and becomes more powerful. *As we get to know the regularities of nature, society and human thinking the autonomy of our personality increases.*

The acceptance, approval of what I have said so far currently means that crime just as all other forms of human behaviour, must be regarded as the causality resulted from the effects of the psychological, somatic and social factors, through the chain of causality. In other words, criminal deeds just as all other human behaviour that have already been formed and determined through the

chain of causality, and human future behaviour, will be determined when they cross the borderline moving between the past and the future. Thus, determination is not a myth, but a real process, even in human society that must be better recognized in conjunction with the use of science so that the future can be outlined with more precision and probability, and put to use for the benefit of humanity.

I believe that based on what has been mentioned so far, it is clear that determination prevails in quantum mechanics *exactly* as in the field of social activity and within this in the field of criminal acts. It is necessary, however, to emphasize that the determination mechanism of prevelance is not the same. *The determination prevailing in the world of inanimate physics is realised mechanically according to the laws of nature. In the world of people and of society, the determination goes through a complicated mechanism and prevails with the help of the human mind, the human conscience. The quality of the psyche in causality depends on the one hand on the inherited and gained somatic (genetic) faculties and on the other hand on the effect of the social and natural environment surrounding the individual.* It is this transmissional mechanism that also grants the possibility to the subject to comprehend the difference between determination in mechanics and in human behaviour.

It is the capability of a person to recognise reality, to apply regularities and to render the future probable that makes him suitable to change the environment and certain conditions of existence to an ever-increasing extent, and this way it is the peaceful creative work that becomes the focal point of human activity and not the fight with one another.

6. Causal regularities and the significance of determination in criminology, in the fight against crime

Taking into consideration that causal regularities and determination are both among the basic theoretical concepts of science, in the present case, the solution of the theoretical and practical problems of the fight against crime has to be connected and adjusted to these concepts.

The first question that necessarily arises here is to what extent are these basic principles accepted by the cultivators, representatives of criminal sciences, legislators and the employers of legal acts. I have no knowledge of anyone having performed any scientific research on this topic. Thus, it is on the basis of my own impression that a 40 – 60% ratio can be considered real. The advocation, declaration of the already quoted Quetelet-type of causal regularity helped, by the end of the 19th century and the beginning of the 20th century, to establish the fact that the determinist view was evident in the criminal laws in

opposition to the classical view built on free will. This view changed at the end of the century as a result of the increase in crime, and the demand for the classical criminal justice system reappeared once again under the title of „neoclassical". During this period, a substantial number of experts looked for new ways and seemed to find the effective and fair means of crime prevention in the new forms of criminal justice. This new, modern form of criminal justice placed the victims of crime and the treatment of the victims' injuries at the heart of criminal justice under the expression known as „restorative criminal justice". In other words, this signifies among other things that criminal justice is only considered just if it serves justice to the victim, provides for reparation of the damage caused to the victim and treats the inflicted injuries. Thus, the measure taken against the perpetrator becomes function of the method and degree of the damage repairing.

The hereby introduced form of criminal justice can only prevail, if it is built on the causal regularity and the acceptance of the theory of determinism, even if this fact does not gain enough ground in everyday activity.

In the present era (near past and near future), a significant proportion of people do not yet possess the level of knowledge that could assist them in getting their bearing in the regularities of social phenomena. I would like to come up with another typical example of the question of knowledge and non-knowledge, which arises in relation to the interpretation of the „presumption of innocence". At present, the presumption of innocence is one of the basic principles of criminal justice and the product of civil revolution. The first formulation can be read in the „Declaration of Human and Civil Rights" published in 1789: „Every man is to be considered innocent until proven guilty". Despite some small modern-day modifications to the language of this sentence, this draft remains one of today's most used expressions.

According to expert literature, if we presume something, it means that the presumed phenomenon must be looked at as it exists, regardless of whether it is so in reality or not. *The presumption of innocence can only be ended by the validity of judgment,* in other words, the person suspected of a criminal act must be presumed innocent until the valid sentence. In practice – if one considers it logically – it means that the police handcuff, arrest innocent people and keep them in custody often for many months and sometimes for years. The prosecution continuously accuses innocent people and asks for the gravest sentences for innocent people. Connecting the release of the presumption of innocence with the valid sentence is an illogical, a useless basic principle in reality. It is only good for boasting about the presumed humanism of criminal justice, about the respect of basic human rights. The real, truly humanist criminal justice must be based on the prohibition of *the presumption of guilt* instead of that of inno-

cence. This principle can be worded logically as follows: *nobody can be seen as guilty until the guilt is not stated by the valid sentence.* This principle contains the fact that the suspect can be guilty, but innocent as well. The task of the sentence is to make a decision in this question.

In recent years we can bear more and more about the reference to the presumption of innocence, especially in connection with politicians who are suspected, become „involved" in some unlawful, illegal matters. It is worthwhile to quote here one sentence fom Tibor Király's study called „What is the value of the presumption of innocence?": „Attention turns to the presumption of innocence mainly, when it turns out that there is something wrong in criminal justice, when mistakes and misunderstandings are out of the ordinary[24]. This statement was true at the time of the publication of the study, but it is especially true nowadays when the out-of-date, unfair side of the criminal justice has become obvious and easy to prove.

The concept of criminal justice is strongly connected to the practice of holding responsible in the public and within this to the judging activity of the court. Many feel that criminal justice is the monopoly of the court. Thus, in the case of holding someone responsible for breaking the law and other negative human behaviour, it is not „justice" that is done, but there is some kind of reaction to the behaviour that is legally prohibited, but cannot be considered as criminal acts performed by people.

In reality, in the great variety of human behaviour, the norm offending, irresponsible, criminal forms of behaviour represent a significant percent. Every crime preventing activity, general and special prevention is aimed at decreasing this number. In recent decades the demand for crime prevention and the expansion of the use of various means needed for achieving this is being realised in an increased measure. It seems that the expansion of criminological knowledge reaches more and more its goals. The evaluation of the norm offending behaviours, the holding responsible and the use of sanctions are gradually built on the principles of causality and determination. In contrast to this as regards norm obiding and responsible behaviour one can say that the view-point still prevails, according to which this kind of behaviour is natural, it originates from the self of man, it is the inborn character of man.

Although one of the great minds of criminal sociology, Gabriel Tarde, in the second half of the 19th century, had already drawn up the viewpoint accepted by a lot of people of that time, saying that *at the time of birth, a child has neither virtues nor criminal characteristics.* It depends on the environment what

[24] Király Tibor: Mit ér az általtlanság vélelme? Budapest, 1987.

kind of a person a child becomes, virtuous or criminal.[25] In other words, human behaviour is determined by personality, genetic, social and natural causes. By now the scientific judgment has been formed in the way that we must react to crime, the perpetrator must be held responsible, and he or she must be punished with the aim of reprisal or prevention.

But how does society react to „norm abiding" behaviour that forms the majority of human behaviour, to the people's activities, who are inspired by the conditions, causality factors, everyday living conditions to follow norms? It is a fact that individuals, who stand out from the circle of norm abiding people are honoured by society and awarded by it. Most people, however, receive remuneration for the job done and perhaps get premiums or payrises for good performances. The average performance, the daily carrying out of norms remain without reaction from most people. The society reacts even to the smallest irresponsibility, but the average responsible activity remains without any reaction. They hardly ever say *thank you for your work performed with responsibility.*

The society not only has to invest energy into decreasing norm offences, into resulting decreasing tendencies of them, but also into increasing, stimulating norm abiding behaviour. I am convinced that if society devoted only half the amount of energy and money allocated to crime prevention to stimulate the people to obide norms, criminality would also show significant decreasing tendency within a few years.

The stimulation of responsible, norm abiding behaviour should be started consciously and decisively in childhood. Children should be made aware of the fact that regularities rule in society as well, and we cannot form a society of our own liking, but one that originates from our past. On the other hand, the system of responsibility must also be formed in such a way (in both the positive and negative field of responsibility) that it follows the basic changes of society and it directs the individual activities in the direction of regularities and favourable social changes.

By establishing this direction we have to take into consideration that at present society does not have a reaction to several norm offences. It is even more so in the cases of norm abiding behaviour. Society usually takes it for granted, when responsibilities are fulfilled on an average level and only significant performances are honoured and awarded. This is a common view, which we can say constitutes an ideology in our society. Cesare Beccaria in his book „Crime and Punishment" wisely said the following: „The award of the virtue is the means of crime prevention as well. In this respect a general silence can be observed in the statute of all nations."[26]

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[25] Responsibility and Society, Responsibility for Crimes and Infractions. International Conference. 19-24. Sept. 1988. Siófok, Hungary.

[26] Cesare Beccaria: Büntett és büntetés. Akadémiai Kiadó. Budapest, 1967.

The individual and social conscience in connection with responsibility significantly depends on the following:

a) on what theoretical basis is the system of holding responsible placed,
b) what norms are expected to be fulfilled by the society from the individual and vice versa, and what norms are expected to be fulfilled by the community and their representatives from the individual
c) how the norm fulfillings are recognised and awarded,
d) how the norm offenders are judged.

On the basis of the knowledge of regularities prevailing in the field of criminal human behaviour we necessarily come to the conclusion with the help of formal logic that the favourable directional change of the volume, the dynamics of crime, can only be reached if the causes of crime change, if we change the causality factors of crime in the favourable direction.

7. The creation of a knowledge-based society

The thought articulated in the title was introduced years ago and gained powerful support especially from the Hungarian Academy of Sciences. In my opinion, if we continue to place this thought in the foreground and try to create its conditions, we will increasingly understand the causality regularities of the social and natural phenomena surrounding us, and thus will be more succesfull at avoiding the effects of chances and increasing the possibility of realising our creations planned for the future. Undoubtedly, we are „entrusted to the hands of blind chance" to certain degree, but there is a connection between the effect of chance and the degree of our knowledge or more precisely our lack of knowledge. The less knowledge we have as regards our aims, the greater role chance will play, and the more we know about causality regularities needed to achieve our aims, the more precision we can outline the events of the future with. These thoughts do not refer so much to the concrete realisation of individual cases, but rather to future possibilities built on the causality of mass phenomena.

The mechanical determination and regularity prevailing in the natural phenomena differs from regularities prevailing in connection with human activity, since human conscience and human knowledge is capable of modifying natural and social regularities to a certain degree. The quality and quantity of modification depend on the recognition and the knowledge of social and natural regularities, as well as human knowledge that is capable of changing these.

I must point out over and over again that the most important task of mankind in the decades, centuries ahead of us is the creation of the knowledge-based society. Nowadays, it has become quite evident that human life and activity on our

planet plays a role with regard to the regularities of the Universe, of the changes that arise therein. Consequently, it is very important to be able to outline the future on the basis of the acquired knowledge with as much precision as possible in the field of social life, but in the Universe as well. In my opinion, in the 21st century science will produce significant results relating to newer and newer regularities of nature and society and within it of regularities of human nature.

SUMMARY

Causality and Determination in the World of Quantum Mechanics and Crime

JÓZSEF VIGH

The Hungarian-born eminent American physicist Edward Teller, the „inventor of the hydrogen bomb," wrote critically in several essays about the impact of determinism on future. He regarded determinism a myth. The events of the past, he wrote, are compatible with causality, yet the future is not entirely predictable. I agree with Teller on that point. In this essay I offer an interpretation of causality, determination, past, present and future, inevitability, necessity and chance. My discussion of those notions is on a general level with a focus on crime and criminology.

The contrasting of the above-mentioned notions and crime can shed light on facts and interrelations that cause tremendous damage and suffering for individuals and society alike. The essay devotes special attention to the views of Adolphe Quetelet, who is justly seen as the father of criminology. Working in the middle of the 18th century, he was the first to discover that there are regularities in human criminal behaviour, just like in other social and natural phenomena. Hence, it follows that crime does not depend on free will, it is controlled by causality. Causality and determinism work in quantum mechanics just like in crime, although not in the same manner, because in human activities, including crime, genetic and psychological traits also play a role.

Consequently, said causality factors determine the criminal human conduct. Accomplished criminal deeds are and will in the future be the results of causality, and they will have become the results of determination in the future, when future shifts into past.

The essay also discusses in detail the present and potential future role human knowledge and knowledge-based society may play in improving the quality of the lives of individuals and society.

RESÜMEE

Kausalität und Determination in der Welt der Quantummechanik und der Kriminalität

JÓZSEF VIGH

Edward Teller, der berühmte Physiker ungarischer Abstammung, der geistige Vater der Wasserstoffbombe, kritisierte in mehreren Studien die Ansicht, gemäß der die Determiniertheit auch für die Zukunft gilt. Er ist der Auffassung, dass der Determinismus ein Mythos sei, die Ereignisse der Vergangenheit mit der Kausalität zu erklären seien, aber für die Zukunft keine eindeutigen Voraussagen gemacht werden können. Mein Gesichtspunkt und meine Weltanschauung stimmen mit den Feststellungen Tellers überein, deshalb werden in der vorliegenden Studie Kausalität, Determination, Vergangenheit, Gegenwart und Zukunft, Zwangsläufigkeit, Gesetzmäßigkeit und Zufälligkeit im Allgemeinen, aber insbesondere im Bereich der Kriminalität und der Kriminologie untersucht und definiert.

Die Herstellung einer Verbindung zwischen den genannten Begriffen und der Kriminalität kann die Fakten und Zusammenhänge aufdecken, welche den Einzelnen und der Gesellschaft so viel Schaden und Leid zufügen. Die Studie befasst sich besonders eingehend mit den Ansichten von Adolphe Quetelet, der mit Recht als Vater der Kriminologie betrachtet wird, denn er erkannte als Erster gegen Mitte des 18. Jahrhunderts, dass im Bereich der kriminellen menschlichen Verhaltensweisen eben so Gesetzmäßigkeiten herrschen, wie im Allgemeinen in der Welt der gesellschaftlichen und der Naturerscheinungen. Das heißt: Straftaten und Kriminalität hängen nicht vom freien Willen der Menschen ab, sondern sie sind Ergebnisse von kausal zusammenhängenden Faktoren. In der Quantummechanik gelten also Determination und Kausalität genau so, wie in der Welt der Kriminalität, obwohl nicht ganz auf die gleiche Art und Weise. Im menschlichen Handeln, demzufolge auch in der Kriminalität, spielen nämlich auch die genetischen Gegebenheiten und die Persönlichkeitsmerkmale der Menschen eine wichtige Rolle, und sie wirken als determinierende Faktoren.

Daraus folgt, dass auch die kriminellen menschlichen Verhaltensweisen durch die genannten Kausalitätsfaktoren determiniert sind. Die kriminellen menschlichen Handlungen waren, sind und werden auch in der Zukunft determiniert, und sie werden mit der Zeit, wenn sie aus der Sphäre der Zukunft in die Vergangenheit geraten, zu determinierten Handlungen.

Die Studie befasst sich verhältnismäßig umfassend auch mit dem Thema, welche Rolle das menschliche Wissen und die Schaffung einer Gesellschaft auf der Basis des Wissens in der Gestaltung und Aufrechterhaltung eines besseren menschlichen Schicksals und gesellschaftlichen Daseins spielen und spielen können.

ALTERNATIVE SANCTIONS: REHABILITATION, DESERVED PUNISHMENT, DECREASING OF CRIME?

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Proportionality is not always linear.

Like every human action *the implementation of sanctions is also an activity that tends to produce some effect.* But as soon as we begin to analyse the content of this effect, the meaning of this obvious statement is not so clear any more, because immediately a number of questions arise:

What kind of effect do we expect from the application of criminal sanctions: should it decrease criminal activity in general or should it, suited to the perpetrator's personality, keep him/her from committing the next crime? Should it retain others, or should it only punish the perpetrator in proportion with the seriousness of the offence committed? Should the effect of the sanction be perceived on the short or on the long term? Should it affront the perpetrator, should it awaken remorse, or is it enough if it leads to self-examination? Should it send out a message that social control is actually working, or is it to be acknowledged that it only serves to discipline certain groups of society?

From what do we expect these results: from punishments only, or a similar effect is expected from measures of criminal law, or perhaps from diversion? Do we expect this effect to come only from the criminal sanction applied, or does the whole vertical of the justice system belong here? And, if yes, is it only the court phase or also the investigation phase? How do we evaluate the functioning of the institutional system that is negative, slow, prolongs the procedure? How do we account for unregistered criminal activity, or criminal activity that is not known by the authorities, or this has no effect whatsoever on punishments?

How do we measure this effect: with the intensity of decrease, or do we expect that another crime shall not be committed at all? If the punished does commit a crime, do we consider the sanction to have worked if the latter offence is less serious, or if a longer period of time passes between the commit-

ting of the two offences? Is it sufficient for only the majority to agree with the application of the punishment, or do we wish to involve the offender in order to maximise the effect?

What is the role of the victim in the process of imposing punishment? Is the punishment more effective based on an interpersonal relationship or based on state power? To what extent are the interests of the victim to be taken into consideration by the application of a sanction?

Crime control can assign different roles to the reinforcement of law and punishment. *Reprisal* is one of the oldest objectives, in which the idea is expressed that society disapproves of the act committed, and the punishment re-establishes the balance lost by the committing of the offence. The purpose of *neutralization* seems most simple: if we close up people that commit crimes higher than the average, then a smaller number of offenders endanger the others. The realization of *selective neutralization* is more complicated than it may first seem: the record of the offender is not the best indicator of the actual behaviour, as the offender is not found at all in many cases; furthermore, the crime itself remains latent many times. *Incapacitation* is a mechanical process, whereas *determent* builds upon the ability of the punishment to change the behaviour of the potential offender. Crime control based on *deterrence* wishes to influence this process of decision-making, it is therefore important that its possible consequence is clear and known. This aim is rooted in medieval time: the hanged body on the gallows was a spectacular illustration of the consequences of crime. However, problems with the spectators of executions existed in Dickens' times: „it seemed much more a mass entertainment, than a participation in somebody's suffering for committing his crime. ... When John Holloway was executed in 1807, 45 thousand people were gathered. Twenty-seven people were trampled on or killed in the crowd; more than a hundred people were injured. Railway companies recruited travellers with cheaper fares to the execution's location."[1]

1. Why and how we punish?

The nature of punishment, the fundament of the punishment practice has been an area of concern not only for philosophers, but also for criminal lawyers and criminologists. The question has been dealt with by numerous foreign and Hungarian social scientists; I shall therefore rely upon their statements and scientific data, when examining the historical changes in the social function of punishment in order to highlight and uncover the new role and function of alternative sanctions.

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[1] Taylor, D. (1998): Crime, Policing and Punishment in England, 1750-1914. St. Martin's Press, New York, p. 131.

The utilitarian approach to punishment surfaced with the Enlightenment. „The punishment of criminals should be useful. A hanged man is good for nothing – a man sentenced to public labour provides a benefit for his country on the one hand, and also serves as a living example" – claimed Voltaire.[2] Punishment is a social necessity – said Durkheim. It serves to maintain moral order, and to defend it, even if it costs more than the harm caused by the crime. Furthermore it establishes the feeling of solidarity and belonging together in the society. Foucault thought that punishment is a statement of authoritative dominance; Elias placed the enforcement of punishment into the process of civilization.

However, the recognition of the social necessity of punishment does not mean the agreement of views upon the social function of punishment. The justification of punishment corresponds strongly to what we think about its purpose. The theories concerning punishment adapt to the wider idea of the state on the justification of the use of punishment, and also mirror the views of mankind of a given age.

If we regard the function of punishment as a category already given in legal thought, which criminal law borrows from ethics, it needs no further justification.[3] „Punishment is a sanction that concerns dignity, as opposed to any other legal sanction." – claims András Szabó.[4] „The function of punishment is not other than – he says elsewhere[5] – to ensure impeccable cohesion through the preservation of the liveliness and effectiveness of community awareness, and the addressee is not primarily the criminal, but this community of decent people, in whom the lack of punishment would raise serious doubts concerning the effectiveness of the norm. In other words, the fundamental role of criminal punishment is actually the strengthening of the broken law. ... Crime negates this cohesion and solidarity categorically, and cohesion and solidarity would weaken if there were no community answer, and would not equilibrate the loosening of social solidarity." Determent can be „differentiated through its distinct and unmistakable emotional nature from all other sanctions applied by non-criminal areas of law" – states István Bibó. Determent is therefore „a sanction of deep outrage in spite of its rationalized and institutionalized form of legal procedure. Consequently, we are unable to accept a system of punishment that simply aims at functional defence: we feel it is indifferent towards the crime, and it lacks the solidarity towards the outrage of the victim and the vic-

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[2] Voltaire: Filozófiai ABC Törvények. II. Budapest, Kossuth Könyvkiadó, 1966.

[3] Bibó, I. (1993): Etika és büntetőjog. In: Deviancia, emberi jogok, garanciák. (szerk.: Gönczöl, K. – Kerezsi, K.) ELTE Szociálpolitikai Tanszék/T-Twins kiadó. Budapest, p. 24.

[4] Szabó, A. (1993): Megelőzés és arányos büntetés. In: Deviancia, emberi jogok, garanciák. (szerk.: Gönczöl, K. – Kerezsi, K.) ELTE Szociálpolitikai Tanszék/T-Twins kiadó, Budapest, p. 99.

[5] Szabó, A. (1996): A bűn és a büntetés erkölcsi kérdései. Főiskolai Figyelő 2. sz. p. 23.

timized community."[6] Can the deterring nature of the punishment be decreased? We might ask and answer with István Bibó's own words: „it can only be decreased in case and to the extent of the decrease of society's incline to outrage and determent."[7]

But did society's incline to outrage and determent really decline at the beginning of the 21st century to an extent that solidarity with the victim can be expressed not only through a deterring sanction? *Can society afford the luxury to try to provide the equilibrium between the harm, damage, and suffering caused for the victim, and the malum caused by the punishment to the offender without the application of a deserved punishment?* In order to be able to answer these questions, we must be familiar with society, its state of affairs, structure and nature. We must know what kind of social order it stands for, or wants to stand for, how it regards deviants, and what kind of measures it considers suitable for deviants – formal and criminal or informal and non-criminal measures.

The search for the causes of criminal human behaviour changed the theories about the justification and purpose of punishment. Denis Szabó divides *these criminological approaches into „consensual" and „conflict" models, emphasizing that based upon the two paradigms, these are rather to be labelled intellectual currents. The ways of the two paradigms in their views on man, and the relationship between man and his surroundings differ fundamentally.* One of them claims the great ductility of human nature, in which environmental factors play a great role.[8] The changeability of man as an idea leads to the requirement that the punishment should be effective, therefore the main function of the punishment becomes prevention. The greater emphasis placed on community interests increases the possibilities of the state to interfere to a greater extent in order to achieve the wished goal, and combine the punishment system with welfare elements. We can determine which elements of the crime are actually or potentially dangerous: this way we can cause the offender „harm" through the punishment, in order to prevent the greater damage done by the committing of a further criminal act. Szabó calls this view of man „homo socials".

The opposing approach regards man as a „homo morals", which is sceptical concerning the abilities of man to change and it claims that a man's actions and behaviour are determined by the biological and psychological boundaries of the human body. It does not take into consideration the possible consequences, when justifying crime and the possible future effects of the punishment. It evaluates the act done in the past, which in itself determines the measure of the necessarily punitive reaction.

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[6] Bibó, I. (1993): Etika... ibid. p. 26.
[7] Bibó, I. (1993): Etika... ibid. p. 27.
[8] Szabó, D. (1981): Kriminológia és kriminálpolitika. Gondolat, Budapest, p. 45.

By Durkheim, punishment is the metaphor of moral communication, but its practical language depends fundamentally on the cultural sensitivity of society. Punishment as moral communication is only effective, if it can be interpreted in only one way,[9] and if the one punished truly understands the message of the punishment.[10] Post-modern society is characterized by the plurality and clash of values and cultures; therefore punishment as a reaction of state authority can be interpreted in multiple ways. According to Sherman's studies for instance, members of different groups of society interpret the interference by the police in cases of family violence differently.[11] Therefore the sanction, as a definite and direct reaction to the act can be questioned, because the individual is socialized in a special form of social relationships and reactions, which in a given case may transfer values that are in opposition to mainstream culture. *The reasonableness or unreasonableness of a sanction is not always determined the same way by lawmakers, law-enforcers and the citizen.* Reasonable sanctions enforce obedience to the law through underlining the legitimacy of the validity of law. Unreasonable sanctions, however, lessen obedience to the law, as they lessen the legitimacy of the validity of law.[12] The fairness of any humiliation depends upon the offender's social bounding to the enforcer of the sanction and society itself,[13] which is emphasized by Sherman from another angle: "the effectiveness of criminal sanctions depends on the basis created by informal social control. Therefore, the more informal social control decreases, the more careful and held-back we have to be in applying criminal sanctions".[14] However, criminal sanctions can be reintegrative, but also humiliating and exclusive.[15]

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[9] Kövér, A. (1996): A büntetés elméletének kritikai megközelítése I. In: Kriminológiai és Kriminalisztikai Tanulmányok, OKKrI. Budapest, p. 92. (Hungarian)

[10] Duff, R.A. (2001): Punishment, Communication and Community. Oxford University Press. p.xvii.

[11] Sherman, L.W. – Berk, R.A. (1984): The specific deterrent effects of arrest for domestic assault. American Sociological Review, 49. 2. p. 261-272.

[12] Tyler, T.R.: Why People Obey the Law. Cited by Sherman, L.W. (1994): Kriminológia és kriminalizálás: Dac és a büntetõ szankcionálás tudománya. In: A társadalmi-politikai változások és a bûnözés – a 21. század kihívása. Magyar Kriminológiai Társaság. Budapest, p. 35. (Hungarian)

[13] Scheff, T.J. – Retzinger, S.M.: Emotions and Violence: Shame and Rage in Destructive Conflicts. Quoted by: Sherman, L.W.: Kriminológia és kriminalizálás... ibid p. 35. (Hungarian)

[14] Sherman, L.W. (1994): Kriminológia és kriminalizálás... ibid p. 31. (Hungarian)

[15] Braithwaite, J. (1996): Crime, Shame and Reintegration. Quoted by: Rob Watts: John Braithwaite and Crime, Shame and Reintegration: Some Reflections on Theory and Criminology. The Australian and New Zealand Journal of Criminology. Volume 29, Number 2., August. p. 124.

The sentencing practice therefore not only shows the changes in criminality, but also indicates the mode of practicing authority held to be rightful, and follows the modifications in the feeling of security of citizens. The larger the tension between society's fear of crime and the efficiency of justice, the more possible the want for repressive-authoritative criminal policy, and opposing, the longer a given justice system is able to fulfil its duties with the measures available, and satisfy society's need for security, the wider room it shall have for a more humane and liberal criminal policy.[16] *The essence of criminal sanction is therefore determined by the wider cultural and social environment, which is also indicated by the fact that the sentencing practice of different countries does not necessarily correspond directly to the tendencies of criminality.* Aebi and Kuhn justified with European data that the frequency of imposing imprisonment is in no relation with the tendencies of criminal behaviour.[17] In 1979 in Sweden, the prison population decreased in spite of the increase of crime rate. Svensson claims that an explanation is provided by the attitude of Swedes, who – especially in case of crimes against property – find restoration more important than imprisonment.[18] Christie found a similar difference between crime rate and prison population.[19] Platek, based on Polish data, draws attention to the following: the increase of the male prison population resulted in an overcrowdedness of prison, the Polish government therefore targeted the decreasing of prison sentences for female offenders. The number of female offenders imprisoned declined in spite of the crime rate being constant.[20] Savelsberg compared the criminal and sentencing data of Germany and the United States for a longer period of time. He found that in Germany prison population declined, although the crime rate was up by 25%. Between 1970 and 1984, the 75% growth of the crime rate was only accompanied by a 50% growth in prison population. In the United States, in spite of the dramatic increase of crime in the 60s and 70s, the frequency of the imprisonment sentence did not change. On the other hand, along with the slight increase of the crime rate in the 1980s, imprisonment sentences doubled. Savelsberg explains the phenomenon with the treatment and labelling theories' sudden popularity in the

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[16] Farkas, A.(1998): A kriminálpolitika és a büntető igazságszolgáltatás hatékonysága. In: Tanulmányok Szabó András 70. szuletésnapjára. (szerk: Gönczöl, K. – Kerezsi, K.) Magyar Kriminológiai Társaság, Budapest, p.81. (Hungarian)

[17] Aebi, M.F. – Kuhn, A. (2000): Number of entries into prison, length of sentences and crime rate. European Journal on Criminal Policy and Research, vol. 8, no. 1.

[18] Svensson, B. (1979): We can get by 3000 prisoners. Sveriges Exportrad Spaktjänst. p. 1-5. Quoted by: Platek, M.(2001): International and European Standards Regarding Alternatives to Imprisonment. In: Alternatives to Imprisonment in Central and Eastern Europe. Penal Reform International – Open Society Foundation, Romania, p. 21.

[19] Christie, N. (1998): Bűnözéskontroll Európában és Észak-Európában. Kriminológiai Közlemények 55.k. Magyar Kriminológiai Társaság, Budapest, p. 98. (Hungarian)

[20] Platek, M. (2001): International and European Standards... ibid. p. 21.

60s and 70s that hindered the dramatic growth of prison sentences. The punitive attitude of Americans developed only a little late, after the end of the great increase in crime rates. The attitude of the public to crime did not develop in itself; it was rather parallel to the strengthening of the neoconservative approach, as a result of which the responsibility for success and unsuccessfulness both economically and socially transferred from the state to the individual.[21] A large number of research experiences have been compiled to show that punishment, as a social institution does not connect to criminality only, but also to economical and social status, especially in well identifiable groups of society. John Irwin, when examining American prisons, came to the conclusion that, irrespective of sanctioning principles, the American prison serves as a means of controlling the potentially dangerous group of poor and unemployed population.[22]

2. The metamorphosis of punishment

The dilemma of „Why we punish?" is closely connected to the question of „How we punish?" In course of the arguments on sanctions, one thing seems to be agreed upon: *in the process of the metamorphosis of punishment, the greatest change occurred at the turn of the 18th and 19th century, when physical punishment was replaced by institutionalized punishment*, what was so logically deduced by Foucault.[23]

Concerning the changes on the essence of punishment, the next big step had come in the 1960s, which evaluation is ambiguous. From among the new phenomena of the mid-20th century, Andrew Scull assigns great significance to two parallel tendencies:

1. *community corrections movement*, in which the offenders are dealt with in the community, instead of locking them up in custodial institutions,
2. *community care movement*, which treats mental patients under community circumstances along similar guidelines, and which results in the systematic closure of large-scale psychiatric institutions.[24] (Although in my opinion this does not clarify, whether the closing of large psychiatric institutions is an effect or a cause of this principle.)

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[21] Savelsberg, J.J. (1994): Knowledge, Domination and Criminal Punishment. AJS Volume 99. Number 4 (January): p. 919.

[22] Irwin, J. (1990): The Jail: Managing the Underclass in American Society. Berkeley, California. Quoted by: Duff, A. – Garland, D. (eds.)(1994): A Reader on Punishment. Oxford University Press. Oxford, p. 32.

[23] Foucault, M. (1979): Discipline and Punish: The Birth of the Prison. New York: Random House

[24] Scull, A. (1977): Decarceration: Community Treatment and the Deviant – A Radical View Englewood Cliffs, NJ: Prentice Hall. Quoted by: Cavadino, M. – Dignan, J.(1992): The Penal System: Introduction. Sage Publications, London, p. 187.

Scull claims that the similar treatment policy of „bad ones" and „mad ones" was made possible by the policy of decarceration dominating both domains. He originates the intention of decarceration from a necessity of cost-cutting, and he does not regard it as intent to create more effective forms of treatment. In his opinion, the abolishing of institutions served neither the interest of deviants, nor that of the public. The process was not a planned one, but a quick step from treatment to non-treatment, which resulted among other consequences in homelessness and big city ghettos.

Reducing the problem to solely financial elements simplifies it to quite an extent. It implies that the state was forced to abolish institutions, because the traditional methods of treating and controlling the „problematic population" had become relatively expensive, even though the cost could have been cut in other ways as well, such as through cutting welfare costs. According to Cavadino and Dignan, this was exactly what the state did: simultaneously with decarceration, the state diminished the expenditures on public service.[25] However, why public service expenses had been cut only in the welfare services, whereas criminal justice was provided increasing financial support, demands an explanation. Stanley Cohen evaluates the above phenomena not as a changing, but as a strengthening of the essence of punishment. The changes of criminal policy connected to the appearance of sanctions enforced in the public provide strong evidence for *the control mechanisms of the state being deeply incorporated into society*.[26] He identifies a number of forms of this kind of spreading of control. Cohen regards the formation of public justice as a form of disciplinary measure, which penetrates into society through the large institutions. Mathiensen, who emphasizes the possibility of control in relation to not only individuals, but also to whole groups and categories of persons, carries on the thought. According to his example, the forms of control involving developed technical devices are furthermore dangerous, because the features of disciplinary measures change, and the application of open measures becomes more and more hidden.[27] Bottoms, however, contradicts this view.[28] In his analysis, the disciplinary measure in the Foucaultean sense contains two key elements:

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[25] Cavadino, M. – Dignan, J.(1992): The Penal System... ibid. p. 189.

[26] Cohen, S. (1979): The Punitive City: Notes on the Dispersal of Social Control. Contemporary Crisis. Vol. 3., p. 339-363.

[27] Mathiensen, T. (1983): The Future of Control Systems – the Case of Norway. In: Garland, D.-Young, P. (Eds) (1983): The Power to Punish: Contemporary Penality and Social Analysis. London: Heinemann. Quoted by: Cavadino, M. – Dignan, J.(1992): The Penal System... ibid. p. 193.

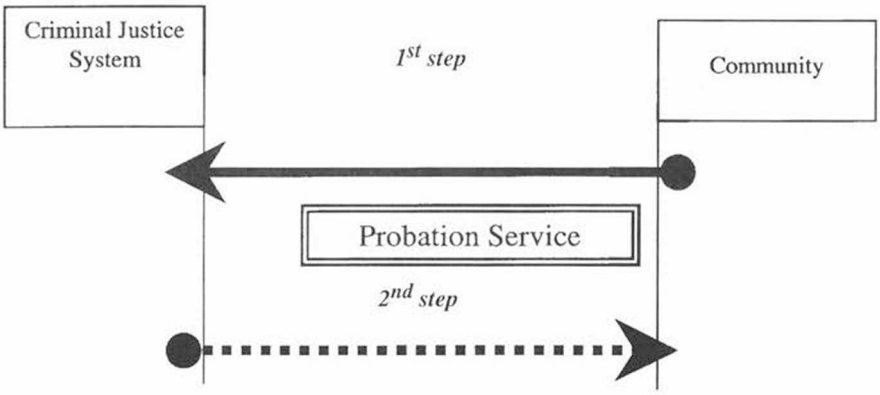
[28] Bottoms, A. (1983): Neglected Features of Contemporary Penal Systems. In: Garland, D.-Young, P. (Eds) (1983): The Power to Punish: Contemporary Penality and Social Analysis. London: Heinemann. Quoted by: Cavadino, M. – Dignan, J.(1992): The Penal System... ibid. p. 193.

authority, and the practical technique of tampering a person's soul in order to compel an obedient, law-abiding behaviour. This way the form of control mentioned by Mathiensen is a more developed one, but only a technical part of police work, and not the practical technique Foucault talks about. Furthermore, Bottoms points out an interesting fact in the post-war sentencing practice: *the significant growth in the frequency of financial sentences.* Notwithstanding it could serve as a substitute for imprisonment, *it cannot be interpreted as a disciplinary punishment in the Foucaltean sense.* This is because neither the financial sentence, nor the suspended sentence required the constant surveillance of an institution of the criminal justice system, therefore it had the role to provide equilibrium opposing to disciplinary sentence. The conclusion is thus drawn, not the disciplinary forms spread in the mid-20th century, but the so-called judicial-jurisdiction model is renewed, which, beside physical punishment, and the replacing institutional punishments, provides a third alternative. Bottoms explains the repellence of their model in the course of development with the techniques of social control, which were built upon this model and had proven ineffective at the time to maintain social order. There is indeed a second big transformation in the mid-20th century, this, however, should not be interpreted in the way that the control concentrated in the prison proliferates into society, but that institutional punishment starts moving towards judicial punishment systems. In the course of this process, the role of punishment among the instruments of social control rather decreases than grows. Contrary to institutional punishments, the offender was meant to be reformed through disciplinary measures, the aim of judicial punishment is to „downgrade individuals to objects", which is served mainly by the formation of uniform sentencing conditions. Bottoms says that the dominance of the judicial system is indicated by the fact that the enforcement of a number of sanctions is not controlled formally by an organization of criminal justice, such as the financial sanctions and lately compensation.[29]

Needless to say, *both directions mentioned are present in the criminal justice practice of today.* In spite of being able to argue – especially regarding the European development – either for the proliferation of the control of criminal justice, or for that of judicial punishment and of strengthening the symbolic function of punishment, *the first model regarding community punishments is more significant.* Bottoms, as well as Cavadino and Dignan also argue that there is no such agent of criminal justice on stage, that would help in expanding the control.

[29] Bottoms, A. (1983): Neglected Features... ibid p. 196.

In my opinion, *today's changes in community sanctions (and probably also the changes in direction) can be interpreted as a social extension of control.* This is perhaps because *there is an agent already present in the community, which is able to expand the disciplinary control of criminal justice: it is the probation service.* This role is made fulfilled by *two new features of the institution enforcing community sanctions: (1) the new approach in criminal policy that pushed these organizations into the community arena, and defines the victim and the community more and more as a client instead of the offender.* However, this change would not be in itself sufficient for the proliferation of control. There is *another identifiable element, which, connected to the former one, solves the problem: (2) the principle of zero tolerance concerning antisocial behaviour that disturbs the quality of life. Probation services, being „trapped" between the two areas, cannot do anything else but transform the expectations back and forth.* Besides, there are two further characteristics to be identified, which underline the statement: (a) the change of the principle and philosophy of crime control, which is necessarily present in the aims to be accomplished with the punishment, and (b) the defining of those governmental goals, which connect the probation services closer and closer to the sphere of criminal justice. The mechanism can be illustrated with a relatively simple diagram.



The aforementioned process can be most plastically traced in a governmental intent conceived in the United Kingdom, which binds the probation service to criminal justice. This convergence can be experienced in other countries as well. The paper entitled „The new foundations of the parole service" published in Norway in 1993 had as one of its fundamental suggestions for change „the need to establish a closer organizational link with the criminal justice sys-

tem".[30] The new Dutch projective „Sanctions in perspective" transformed the old „task-based" legal consequences into criminal sanctions, which „are enforced under the probation service's strict supervision, from the sentencing to the withdrawing of freedom and through the phases of constraint of freedom to social reintegration."[31] The same tendency is to be observed in Eastern-European countries, where the newly formed or transformed probation services are originally in close connection with the criminal justice branch.

The degree of punishment depends upon the degree of moral outrage – claimed Denis Szabó. The degree of moral outrage, however, depends rather on how much the public trusts the effectiveness of the organizations of public safety – he adds most practically.[32] This trust can naturally be defined in a positive and a negative manner as well, and can have heightened significance in cases, which are not carried out under closed institutional circumstances. *The non-custodial penalties do not only raise the question where their place is among the arsenal of criminal sanctions, but also the question of along which guidelines and principles should they be applied.* Do they have to be imposed in accordance with the requirement of proportionality, and if yes, how can this be achieved? Does it have any significance that these sanctions place a smaller financial burden on the criminal justice system than imprisonment? Have the special features of the „environment", in which these sanctions are carried out, to be taken into consideration? Is it important how criminal justice regards community?

The relationship between state, market participants, and citizens changes doubtlessly and is constantly transforming in late-modern societies, as did the explanation of the need for this relationship. In the past decades, the gradual dominance of the idea of community in criminal justice and in neighbouring areas was detectable. New categories such as community policing, community prosecution and community justice or community correction all indicate that *the notion of community has indeed come into close proximity with criminal justice. These phrases nonetheless also indicate that this relationship is created between participants, among which connection would have been unimaginable a few decades ago.* Among the sanctions the formation of the idea of community penalties, or the means of restorative justice (such as mediation, compensation, or family group conferences), which introduce new characters into the

[30] Larsson, P. (2002): Punishment in the Community: Norwegian Experiences with Community Sanctions and Measures. In: Albrecht, H-J. – van Kalmthout, A (eds): Community Sanctions and Measures in Europe and North America. ED. iuscrim, Max-Planck Institute, Freiburg/Breisgau, p. 407.

[31] Sanction policy, Yearbook 2000. http://www.minjust.nl/b_organ/dpjs/engels/yb2000_sanction_policy.htm

[32] Szabó, D. (1981): Kriminológia... ibid p. 26. (Hungarian)

system of accountability, and apply formerly unknown ways of problem solving, all indicate that community has become a central notion in criminal justice. Thus, there seems to be a need to examine, which elements justify the riveting of this notion in criminal justice. Does the essence of this concept differ from that in other disciplines, does it rearrange the correlation between the traditional and new participants of criminal justice, and does it change the functioning of criminal justice? The concept of community in the aforementioned context deserves further examination from at least two aspects: from the relation between (1) crime and community, and (2) community and the criminal justice system.

3. The concept of community

Let us start by clarifying what we mean by the concept of community. According to Vilmos Csányi „the biological optimum of social aptitude is at small groups of 50-100, perhaps at tribal and clan formations of a couple of hundred members. In modern societies, people belong to numerous groups and organizations at the same time, nonetheless quite loosely. ... The groups based upon relationships involving feelings and faithfulness are less significant ... Modern people behave as though they themselves were a group."[33] *Community can be defined as a neighbourhood, school team, trade union, civil circles, or circles based on friendship, large family, native tribe, or any other actual group* – claim Bazemore and Griffiths.[34] Howard Zehr uses the word „shalom" to describe a group, which is *peaceful, obedient, and free*. This does not mean no conflicts, but oppositions and crimes are secured by a process that respects all rights – especially those of children.[35]

Most sources build the *concept of community upon one or more aspects of social complexity, which can be a geographical territory, consensus, division of labour, etc.* Tönnies' description relies on the distinction of the concepts of community and society, according to which all trusting, homely and exclusive coexistence should be regarded as a community (Gemeinschaft). *Community is a living organism*, whilst society is a mechanical compound, an artificial crea-

[33] Csányi, V.: A politikának színt kell vallania. Népszabadság, September 8, 2001. p. 21. (Hungarian)

[34] Bazemore, G. – Griffiths, T. C. (1997): Conferences, Circles, Boards and Mediations: Scouting the „New Wave" of Community Justice Decisionmaking Approaches. Federal Probation, 61 (2), pp. 25–37.

[35] Zehr, H. (1995): Changing lenses: a new focus for crime and justice. 2nd ed. Scottdale, PA: Herald Press. Quoted by: Wright, M. (2000): Restorative justice for juveniles and adults. Paper for Conference on 'Human rights and education: global and regional problems and perspectives', Khanti-Mansiysk, 21-24 August. Manuscript

tion (Gesellschaft).[36] MacIver and Page emphasize *the social relations of the individual and community cohesion in the definition of community*: „community is an area of social life, which is characterized by a certain degree of social cohesion. The fundament of community is locality and a feeling of community." The development of communication weakens without doubt the criterion of being bound locally, but this change in the opinion does not diminish the relation between social cohesion and geographical location in the concept of community.[37] It is an accepted statement in the social studies of today that „high modernity" is formed by the twin processes of globalization and localization.[38] It is thus an important aspect, stressed by MacIver and Page that *communities exist within larger communities, and that the basis of community is locality*. Talcott Parsons takes on a systematic approach in defining community as a special phenomenon of the structure of the social system, which can be regarded as the local arrangement of persons, as well as their actions.[39]

The *feeling of belonging together, of belonging somewhere* has a central place in many approaches of the concept of community. The close relationship, however, exactly because of the aforementioned technical development, does not necessarily mean territorial identicalness. Melvin Webber mentions professional communities as an example, members of which maintain close relationships with a wide network of fellow professionals, who may live all over the world. Webber concludes that the fundamental element of community is therefore communication. Thus, he names two defining elements of community: *mutual interest and communication*.[40]

The concept of community does not only occur in relation to the need of clarifying conceptual terms, but many times out of *emotional reasons*. The main question of this approach is: how can something, which is lost, be restored? The conclusion is – interestingly – mostly that the trouble is not with the community, but much more with the people the community is or should be constituted of.[41] Putnam's description in 1995 was that America is no longer a nation

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[36] Tönnies, F. (1994): Közösség és társadalom. In: Gosztonyi, G. (ed.): Közösségi szociális munka. A szociális munka elmélete és gyakorlata, 3. kötet. Semmelweis Kiadó, Budapest, p. 197. (Hungarian)

[37] MacIver, R.M. – Page, C.H. (1994): A közösség az, amelyben az egyén teljes életet élhet. In: Közösségi szociális munka... ibid p. 199. (Hungarian)

[38] Giddens, A. (1990): The Concequences of Modernity, Cambridge: Polity Press. Quoted by: Crawford, A. (1997): The Local Governance of Crime: Appeals to Community and Partnerships. Clarendon Press, Oxford p. 5.

[39] Parsons, T. (1970) On Building Social System Theory: A Personal History. Daedalus, 99:826-881

[40] Webber, M.M. (1994): Az érdekközösség definíciójához. In: Közösségi szociális munka.... ibid.p. 205. (Hungarian)

[41] Wolfson, A. (1997): Individualism: New and old. Public Interest. Winter. (126): pp. 75-88.

of joiners; Americans are „bowling alone", not in bowling leagues. Some might respond so what or good riddance.[42] *The socio-psychological approach cannot be forgotten when dealing with the concept of community, which defines it as a compound of personality types, as „every community can set boundaries to the possibilities of the development of personality*".[43] It is hardly a coincidence, that the hero type of American films is the lone ranger, the 'one against all'-type, whereas in Europe the hero is more wavering, full of doubts. Community gets great emphasis in the system of arguments of conservatives, especially in regarding the possible emotional aspect, the lost community, which is not only a preserving, but also an environment full of requirements. Amitai Etzioni created the communitarian manifesto in 1991, in which great emphasis was placed on the need to establish balance between rights and obligations.[44] In defining the concept of community Etzioni mentions as important the *closeness of relationships and the community of culture.* Community can be mostly characterized by two features – he says – the creation of effective networks of relation within groups of members (opposed to simple pair attachments, or a chain of individual relationships), such, which thoroughly intertwine the group, and one strengthens the other. At the same time the concept of community also contains commitment, which means accepting the values, norms and approaches adapted by the community.[45] This approach claims that there are two simultaneous powers predominantly present: the centripetal power of community and the centrifugal power of individual autonomy. These two powers, obeying rules and autonomy are present in the tension between rights and obligations.

It is hardly a coincidence, that connection with the concept of community, the *question of the relationship of different communities is raised, just as the problem of majority/minority,* which puts the problem in a special light concerning the relation between community and crime. According to Hobsbawm, „the word community had never before been used without any consideration or content, than in the decade in which communities, in the sociological sense, were most difficult to find in real life".[46] During the past decades, the relationship to crime, as a community problem changed. It became general in public

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[42] Putnam, R.: „Bowling Alone: America's Declining Social Capital". Journal of Democracy. Quoted by: Galston, William, A. (1997): Crime fighters. Public Interest. (126): Winter pp. 102-107

[43] Wirth, L. (1994): Adalékok a helyi közösség definíciójához. In: Közösségi szociális munka... ibid p. 203. (Hungarian)

[44] Etzioni, A.(1991): The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda. Crown. 323 pp.

[45] Etzioni, A. (1995): The Attack on Community: The Grooved Debate. Society, Volume 32, No. 5, (July/August), pp. 12-17.

[46] Hobsbawm, E. (1995): Age of Extremes: The Short Twentieth Century, 1914-1991, London: Abacus. Quoted by: Crawford, A. (1997): The Local Governance... ibid. p.148.

opinion and politics that crime is a result of the decline and malfunctioning of the community, which can be traced back to the weakening of community relations, to the moral decline of the community, and on the whole to the malfunction of the informal control mechanisms of the community. This approach leads directly to the idea that crime can be decreased through the strengthening of communities. The key element of the approach is *how to define the community – along what guidelines and principles –, the community that needs to be strengthened.* A further problem is that in some cases community norms themselves lead to breaking the law – as already proven by research on sub-culture and the football-hooliganism of nowadays. Regarding crime prevention Currie points out convincingly that community can be defined out of two premises, which evaluate the possible problem-solving capacities of a community differently. The first hypothesis, characteristic especially of political discourse, assigns a *symbolic meaning to community*, and explains it as a given allocation of common approaches, actually from a socio-psychological point of view. It relies upon the symbolic notion of community in people's minds, and if attitudes and symbols can be changed, that does not only lead to the right behaviour, but also strengthens the people's sense of community and vice versa. In the field of crime control, the principle of „broken windows" shows that the concept is easily definable on the level of symbols and attitudes being significant. Wilson and Kelling say that the „policy of broken windows" in the field of crime control means that it cannot be detached from community. On the contrary, it depends upon the success in restoring and strengthening community: „the new focus in maintaining public order is not the vigilance liberals' fear, but the new sense of optimism, in which civilization and community can be restored.[47] According to Currie, the symbolic approach of the first premise lacks the „structural awareness" of the second one. From this point of view, the community is not merely an allocation of approaches, which needs to be „implanted" or „mobilized", but an *active creation of institutions of long-term effect* (e.g. work, family connections, religious and community organizations) that are able to affect integrity of economic and social forces.[48]

The elements of the concept of local community, especially locality – 'belonging somewhere' – and the system of relations regarding a given community are extremely significant in the evaluation of the new developments of crime control. This feature is not to be neglected when examining community sanctions, because *this is the environment, the locality, in which alternative sanctions are*

[47] Wilson, J.Q. – Kelling, G.L.(1989): Making Neighbourhoods Safe. The Atlantic Monthly; February Volume 263, Number 2; pp. 46-52.

[48] Currie, E. (1988): 'Two Visions of Community Crime Prevention'. In: T. Hope – M. Shaw (eds): Communities and Crime Reduction. London:HMSO. Quoted by: Crawford, A. (1997): The Local Governance... ibid. p.155.

realized. Interestingly, a small number of sources are attentive to the question of community, they rather focus on the effectiveness and the enforcing 'technique' of sanctions. The literature concerning crime prevention deals with the question in ample detail; therefore I shall use these sources to analyze the 'enforcing environment' of community sanctions. I will not deal with the quite rich literature of crime prevention; I will rather concentrate on the problems that can influence the enforcement of community sanctions.

4. New notion in the system: the 'community safety'

The studies of latency indicate that *citizens assign greatest significance to those crimes, which were committed in their residential area.* There are differences in the security of the residential areas, merely being a member of a minority can be a determining factor in victimization: black Americans have a 31% greater chance of becoming a victim than whites.[49] Crime prevention therefore aims at influencing the individual and social causes of criminality, decreasing the danger of committing a crime, reducing the harmful effects of criminality on individuals and society, as well as the fear of crime of citizens. The importance of crime prevention and the imposing of preventive factors are not questioned, and have extreme significance in dealing with petty offences and unlawful behaviour endangering the life of a local community. It is more and more accepted that this is associated with the activity of local self-governments.

Naturally, the *question arises: why did the approach emphasizing the security of the* community *prevail just in the 80s and 90s?* It is clear that by this time it became apparent that the system of crime control is no longer able to follow the growth of crime, and to bring to a halt the unfavourable changes, so new solutions were indispensable. *The loss of trust in the state had a central role in the process. Especially the faith in the state's ability to guarantee safety, and because of the escalation of social fear, people have begun to 'take back' the care for their own security from the state.* The loss of trust is characteristic not only in connection with the institutions of criminal justice, but also with governmental establishment in general. Although in the 1970s the distrust in authorities was regarded as a democratic crisis, today it is rather regarded as a requisite of the modernization process.[50] This is illustrated by the fact that in the new

[49] Sherman, L.W. (2002): Trust and Confidence in Criminal Justice. National Institute of Justice Journal, Issue No. 248., p. 23.

[50] Norris, N. – Pipa, M (eds)(1998): Critical Citizens: Global Support for Democtaric Governance. Oxford: Oxford University Press. Quoted by: Bondeson, U.V. (2003): Nordic Moral Climates. Value Continuities and Discontinuities in Denmark, Finland, Norway, and Sweden. Transaction Publishers, p. 58.

member states of the EU, 27% of those questioned trust their countries' legal system, whilst the rate was 48% in the old member states. There is a significant difference regarding the trust in the police: 45% of the citizens of the new member states as opposed to the former positive answer of 65% given by old member states.[51] Americans employ 1.5 million private police officers for duties the professional police force is unable to handle.[52] Accordingly, it is interesting to note the study, which shows that Americans trust neither their banking system, nor the education system, nor the system of state justice. In spite of this, their trust in the police is quite high. In *Sherman's opinion, the loss of trust is to be traced back to the general decline in trusting hierarchical relations.*[53] His example illustrates the symbols of inequality manifested in criminal justice by the procedures that require persons to stand up as the judge enters the room, or citizens who are required to obey instructions of the police, even though the police officer in charge is disrespectful. These rules suggest that the official is more important than the citizen, and this intensifies the distrust in law. He defines the theory of procedural equality, according to which the equal treatment of citizens encourages trust in authorities. Thus, people demand relationships based upon equality in all areas of life. Let us *examine Sherman's statements and align his claims and the aspects he does not take into consideration.* According to him, citizens do not accept hierarchy in the public sphere, as the authenticity of state establishment's declines. However, American citizens believe in the police, even though it is also an institution of state authority. Sherman explains this with egalitarian culture and the prevailing of consensual procedural equality, which he traces back to the changed relationship of police and public. The police pay attention to local problems, play a role of service, and interpret its activities according to the consensual model. All of this sounds very convincing. It fails to recognize, however, that the relation of state power and citizens cannot be interpreted simply from the point of view of equality. Especially, because people do not at all esteem each other equal in interpersonal relationships, as they do not question financial inequality. Most people accept other types of differences beside financial inequality, such as differences in sexuality or forms of coexistence in families. (This is what Moynihan refers to, when speaking about the „devaluation" of deviance.) Financial inequality is what produces actual differences, not only regarding income circumstances, but also opportunities and possibilities for the promotion of interests. In other words, the acceptance of financial inequalities cannot be fit into Sherman's consensual model of equality. The symbols pre-

[51] Eurobarometer Spring 2004. Public Opinion in the European Union. Standard Eurobarometer, European Commission.

[52] Walinsky, A.(1995): The Crisis of Public Order. The Atlantic Monthly; July, Vol. 276, No.1; pp. 39-54.

[53] Sherman, L.W. (2002): Trust and Confidence... ibid, p. 23.

vailing in criminal justice do not really represent the person wearing the judge's robe or the police officer's uniform, but rather the connotations of the role. Just like a medicine man is not respected by people as a person, but as an entity, whose function is to establish a link with gods and supernatural powers. The special treatment is for the role, and the person embodying the role. Consequently, if people do not want to stand up upon the judge's entering, or do not follow the instructions of the police officers, that is not because they feel themselves equal, but because they do not respect the role the person embodies, and do not obey the rule it represents. The theory of procedural equality does not take into consideration an important initial step, namely that the requirement of equality only arises in those cases already chosen. The theory of procedural equality therefore returns to the concept of equality before law, which it replenishes with a few new elements, but leaves the very important question open, whether it is in connection with the equality of opportunities. The consensual procedural model could indeed be significant in criminal justice, and can have an important effect in treatment of offences, especially in the assistance to proliferate measures of restorative justice. As if, beside the „consensual equality model" existed a „consensual inequality model", for the analysis of which one needs to step out of the justice system to the examination of systems of social inequality. A detailed analysis would lead far from our studied topic, however, it needs to be noted that it can have significance, when dealing with community sanctions that most people now accept the „splitting apart" of society, that is to say normalizes the phenomenon, and assigns a role to criminal justice in dealing with the consequences. The greater trust in the police is most probably due to the fact that this organization is thought to guarantee security.

Giddens claims that the main reason for the changing of the community is due to the alteration in the source of trust. The importance of local trust has been replaced by relationships, which correspond to abstract systems that are not fully embedded.[54] The research of Lawrence Friedman shows that the nature of authority has changed in modern cultures built upon fame: the former vertical point of view (in which people looked up to their leaders) has been replaced by the horizontal approach (in which people choose a leader from the centre of society, whom they know by name and face).[55] It is unquestionable, says Bottoms, that trust used to be locally based, and that most important relationships were those of family and relatives. The local community meant a geographi-

[54] Giddens, A. (1990): The Consequences of Modernity. Cambridge: Polity Press. Quoted by: Bottoms, A. (2001): Compliance and community penalties. In: Bottoms, A. – Gelsthorpe, L. – Rex, S. (eds.): Community Penalties: Change and challenges. Willan Publishing. p. 108.

[55] Friedman, L. (1999): The Horizontal Society. New Haven, CT:Yale University Press, p.14-15. Quoted by: Sherman, L.W. (2002): Trust and Confidence... ibid. p. 29.

cally well-definable territory, where members of the community knew each other. Religion was practiced in local churches, and traditions served as a guideline for actions. The local binding of trust did indeed weaken, but has not fully disappeared. Instead of local trust, financial and political guidelines have become important, and the ability to adjust to one's surroundings constantly. Personal relationships have also altered, „people increasingly define themselves as individuals rather than in the context of group affiliations. In the field of personal relationships, trust is increasingly placed on personally chosen one-to-one relationships".[56]

Liddle feels the relationship of globalization and community has to be examined, when dealing with the question of crime prevention becoming a community issue.[57] The change in this relation – in close connection with the welfare state becoming a residual welfare state – resulted in the state withdrawing himself from direct service provision to co-ordinate service delivery. The changing of this role is well illustrated by the boat example of Osborn and Gaebler: the advancing of the boat depends on the strength of the oarsman, whereas the heading depends on the skill of the boat-setter, the state therefore has become a boat-setter instead of its former position of oarsman.[58] Not only did state functions transform, but also the relationship between central and local governments, as did the structures through which central governments made an impact.

It is hardly a coincidence, that there is always a contradiction between the use and recognition of the necessity of short term (situational) and long-term (social developmental) aims of crime prevention. The practice of crime prevention shows that situational and social developmental crime prevention fuse easily in the idea of community security: it endeavours to limit the opportunity of crime in every possible and actual way, and takes into equal consideration all possible and actual motivations for committing crimes. This combination has been realized in practice with the primacy of situational measures. *New technique (such as CCTV, electronic monitoring) is applied intensively in situational crime prevention, and influences to a great extent the acceptance of measures of community sanctions, which operate along the same principles (such as electronic surveillance or house arrest).* The question of community security was supplemented with the purpose of influencing the citizens' fear of crime. The gravity of the problem is represented by the irrationally great fear of crime

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[56] Bottoms, A. (2001): Compliance and community penalties. In: Bottoms, A. – Gelsthorpe, L. – Rex, S. (eds.): Community Penalties... ibid p. 110.

[57] Liddle, M. (2001): Community Penalties in the context of contemporary social change. In: Bottoms, A. – Gelsthorpe, L. – Rex, S. (eds.): Community Penalties... ibid p. 53.

[58] Osborne, D. – Gaebler, D. (1992): Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector. Reading, MA: Addison-Wesley.

compared to the general situation shown in the British Crime Survey.[59] Research data show that the lack of feeling of safety is not connected to traditional categories of crime, but rather to the disorder of the environment, which contributes to the discomfort of citizens: graffiti, neglected residential areas, parking difficulties and the growing number of beggars.[60] It is of great significance that the lack of feeling secure is not characteristic of those in actual danger of becoming a victim, but of those, who are only insignificantly endangered, and it has the consequence that they regard their environment as a hostile one, which they cannot control.[61] *The reference to community does not only mean the place in which they apply measures of crime prevention, but also the community, which invites to participate in problem-solving – it is naturally doubtful what kind of co-operation can be achieved in the general lack of feeling of safety. The approach towards crime and other breaches of law, as well as the changing of the self-image of the community can indeed have a significant impact on the enforcement of community sanctions.*

As I have already mentioned, the determining factors of belonging to a community are territory and the 'feeling of belonging somewhere'. Both raise the question, *where the boundaries of community lie, or more precisely, what are the boundaries of acceptance and exclusion.* The question is in close connection with the other important element of belonging to a community, which requires *the acceptance of community values and rules. The acceptance, however, presupposes the community to be homogeneous, and this homogeneity is exactly what simplifies the decision for crime control based on community: it can rely on social groups, in which the presupposition proves to be true.* Crime prevention provides the example, which illustrates the paradox nature of the hypothesis: the movement of neighbours for each other can best be organized in middle-class areas, where the problem of crime is insignificant (unlike the fear of crime).[62] It is also a fact that this approach does not function at the most endangered groups: it is impossible to form groups of crime prevention in areas of disadvantageous situation with a high crime rate.[63]

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[59] Gilling, D. (1997): Community Safety: A Critique. In: The British Criminology Conferences: Selected Proceedings. Volume 2. Papers from the British Criminology Conference, Queens University, Belfast, 15-19 July 1997.

[60] See in detail: Kerezsi, K. – Finszter, G. – Ko, J. – Gosztonyi, G.(2001): A területi bűnmegelőzés lehetőségei Budapest V., IX. és XXII. kerületében Kriminológiai Tanulmányok XXXVIII. k. Országos Kriminológiai Intézet. Budapest, pp. 112-180. (Hungarian)

[61] Liddle, A.M. – Feloy, M. (1997): Nuisance Problems in Brixton – Describing Local Experience, Designing Effective Solutions. London: NACRO. Quoted by: Liddle, M. (2001): Community Penalties... ibid. p. 57.

[62] Kerezsi, K. (1999): Önkormányzat és közösségi bűnmegelőzés. In: „Bűnözés és bűnmegelőzés a válságrégiókban" Kriminológiai Közlemények Különkiadás. (A III. Országos Kriminológiai Vándorgyűlés anyaga) Magyar Kriminológiai Társaság, Budapest-Miskolc, pp. 84-110. (Hungarian)

[63] Gilling, D. (1997): Community Safety... ibid.

Undoubtedly, the community measures of problem solving applied in the field of crime prevention are innovative, meet the expectations of the community, and refer to a systematic-theoretical approach. The question remains, however, how local community is defined by the forming cooperation between the local residential groups, the local business sphere and civil organizations. *In the crime prevention strategy of community safety, the differentiation between social and situational may lead to the differentiation of „us" (those who obey the law) and „them" (those to be controlled, deterred, and punished).*[64] The policy and practice of crime prevention building upon community ideas may not only change the relationship of certain groups of society, but has also begun to reorder the relationship between citizen and state, and to draw new boundaries between public and private domains and between „legitimate citizens" and suspects or outsiders.[65] The community in this respect also demonstrates the existence of an 'in-between' area, which is situated somewhere between the individual and the far-away government, and is able to combine the conservative idea of individual responsibility with the liberal approach, which believes that individual problems should be treated within the community. The logic of prevention seeks for the earliest opportunity to intervene: so early that the problem has not even evolved, so that it can be dealt with before it becomes unmanageable. With zero tolerance, this purpose leads to even stronger control. What was regarded as pre-delinquent behaviour is now labelled as antisocial, or as an act that 'worsens the quality of life', and justifies early intervention according to the theory of 'broken windows' before the decline and the spiral of disorder starts, or the criminal career develops. This is the area of zero tolerance, which leaves little room to the constructive measures with the use of means of criminalization and control.[66] *The security of community as an objective reaches far beyond the traditional scope of criminal offences.*

It is unquestionable that *the community approach more and more characterizes the debate on the diverse measures of crime control. With this, however, the danger of substituting possibilities comes along, limited by guarantees of the institutions of criminal justice by the definition of „community", and the „community" becomes a general solution to a lot of problems relating to criminal justice.* Garland calls the attempt of the state to seek to shift responsibility to the individual and the market through making links with the community and the private sector as the responsibilization strategy, and defines it as

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[64] Squires, P. (1997): Criminology and the 'Community Safety' Paradigm: Safety, Power and Success and the Limits of the Local. In: The British Criminology Conferences: Selected Proceedings. Volume 2. Papers from the British Criminology Conference, Queens University, Belfast, 15-19 July.

[65] Sanchez, L.(1999): Brave New Communities: On the Production of Identities and Communities in Criminal Justice and Penology. ASC Conference, Toronto, 1999.

[66] Gilling, D. (1997): Community Safety... ibid.

redistribution of the tasks of crime control.[67] The danger becomes especially big if governments prefer the community-oriented approach. In political rhetoric, the references to community indicate that in this context, community means groups of humans, which are theoretically unified, but split apart in the practical realization of community control. They split apart into groups of people living in mainly middle-class environments, whose anguishes have to be decreased and who have to face relatively few problems, and into people, whose problems, or rather the problems related to them, need to be diminished with means of control. Some approaches endeavour to make people part of symbolic places from which they were excluded, while other approaches are rather interested in identifying and isolating the social groups to be excluded, forgetting entirely the necessity of integration. The possible consequence is indicated by the formation of actuarial justice, in which the danger involving individuals is replaced by the danger involving groups, and the treatment of dangerousness requires the application of generalized measures of control, as well as the elaboration of developed techniques of control.[68]

In the field of crime control, locality became first significant in the practice of community policing, which seeks to increase community participation in crime control. Tyler's research shows that Americans, especially members of minority groups are highly sensitive to how the criminal justice system treats them, and polite or rude behaviour of officials becomes more important than whether they are fined or not.[69] The prevailing of procedural equality, or the lack of it, influences the people's attitude towards authorities. However, the essence is pointed out by Szigeti in relation to community policing: „heterogeneous social norms of heterogeneous communities form the nature of social norms beyond legality in modern, pluralistic society; therefore the taking over of competence beyond legality and the control of everyday moralities could mean an unlawful interference in the life of a given community."[70] The problem is similar concerning the community relations of other institutions of criminal justice. The 'community policing' can become a notion without content (as authorization and mutual dependence), and can be easily regarded as a solution for various urban problems – warns Kaminer.[71]

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[67] Garland, D. (2001): The Culture of Control (Crime and Social Order in Contemporary Society). Oxford University Press, Oxford. p. 124.

[68] Feeley, M. – Simon, J. (1995): The new penology: Notes on the emerging strategy of corrections and its implications. Criminology (ASC), 30, p. 452-455.

[69] Tyler, T.(1990): Why People Obey the Law. New Haven, CT: Yale University Press. Quoted by: Sherman, L.W. (2002): Trust and Confidence... ibid. p. 26.

[70] Szigeti, P. (2001): Vázlat a közbiztonság három dimenziójáról: világrendszer – nemzetállami szint és lokalitás. Jogtudományi Közlöny 4. szám., p. 161. (Hungarian)

[71] Kaminer, W. (1994): Crime and Community. The Atlantic Monthly; May, Vol. 273, No. 5; p. 111-120.

We nevertheless experience that the notion of community has a life of its own in criminal justice, and after the police all traditional organizations of criminal justice have been assigned with the attribute of community. All signs indicate that the criminal justice relies more and more on the community performing its duties, and this process continues to evolve. This can be detected not only in the United States, but also in Europe, nevertheless with different content – in the long-term as I would like to believe. The community has doubtlessly great significance in the implementation of non-custodial sanctions, although numerous factors have not yet been clarified. The recommendation of the European Union on community sanctions[72] does not deal with the defining of community in connection with alternative sanctions, it only reacts to the 'non-custodial' component, and does not at all take into consideration the environment, in which these sanctions are enforced. *The content of community sanctions is determined by the status and cultural characteristics of a given community.* In this context, it is especially important to take the ambivalent tendencies of today into consideration: *the simultaneous presence of the usually merely rhetorical global inclusion and the very practical local exclusion.* Gilling has quite a pessimistic view of the future in claiming that „although reformers and people of leftist values may regard this change as the reoccurrence of welfare values in the area of criminal justice, it is not what is happening in practice, and is highly unlikely to happen in the future".[73] McGuire on the other hand feels that the interest in rehabilitation is reviving, which is also indicated by the probation programs building upon the conscious regulating of behaviour applied by parole services and the community initiatives effective in the decreasing of repeating offences.[74] Carney has a similar opinion in evaluating the Australian situation in observing that the application of drug-courts and restorative justice are characterized by the „direct achieving of determined social purposes (such as rehabilitation and reintegration)".[75]

However, probation services, the objective of reintegration and rehabilitation should not yet be dismissed in criminal justice. It is nonetheless a fact that the approach, which eliminated the moral elements from punishment and regarded it as a purely therapeutic treatment based on social work, has indeed come to an end. As I stated in 1995, the difference between the English and the Hungarian

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[72] Európa Tanács Ajánlása (1992): A Közösségekre Alapozott Büntetésekről és Intézkedésekről [(RC92)16])

[73] Gilling, D. (1997): Community Safety... ibid.

[74] McGuire, J.(1995): What Works: Reducing Re-offending. Chichester: John Wiley. Quoted by: Gelsthorpe, L. (2001): Accountability: difference and diversity in the delivery of community penalties. In: Bottoms, A.-Gelsthorpe, L.-Rex,S.(eds) (2001): Community Penalties... ibid. p.153.

[75] Carney, T. (2000): New Configurations of Justice and Services for the Vulnerable: Panacea or Panegyric? The Australian and New Zealand Journal of Criminology. Vol. 33, No. 3., p. 321.

parole service is that the English one is too close to social work and is too far from the expectations of criminal justice.[76] In Hungary on the contrary: there are no relations to the social sphere, only to criminal justice. The right way is somewhere in the middle, where criminal policy and social policy are overlapping each other. In other words, *the probation service can be the organization in criminal justice, which enables the cooperation of different professions, and establishes a link between the traditional and modern measures of the criminal justice system.* However, the somewhat hectic times in criminal policy do not really facilitate this evaluation. Although no final analysis can be made, we are able to enumerate the existing tendencies, and even more articulately identify the probable dangers impending upon community punishments.

5. Alternative sanctions and community sanctions: old content in new disguise?

Imprisonment roots in the principle system of the Enlightenment, and was an „alternative" sanction raising hopes as opposed to the death penalty, body mutilation, forced labour or the galley. At that time it not only seemed a humane and rational solution, but also carried in itself the possibility of rehabilitation and reforming the offender. It is more than a hundred years ago, that the idea of alternative sanctions surfaced instead of short-term imprisonment, first in connection with juveniles. Since then, perhaps only except the USA from among the defining countries, the treatment system of juveniles has always been an experimental ground for progressive initiatives. This is well detectable in the field of community sanctions.

The systematic placement of alternative sanctions and the enlightening of its other features should be started with clarifying the concept itself. As György Vókó rightly states, in the area of sanctions not involving imprisonment, the alternative is actually ambiguous: *(a)* it can mean the process before the court phase, which purpose is to hinder the case to be taken to court, *(b)* it can also mean the actual precipitation of imprisonment, *(c)* and the elimination of the harmful effects of the imprisonment.[77]

The question has even more sides, as different approaches in criminal policy may have notions with definitely different significance:

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[76] Kerezsi, K. (1995): Pártfogók „pórázon". In: A modern büntetőpolitika problémái Nagy-Britanniában (szerk.: Gönczöl, K.) Kriminológiai Közlemények 51. k. Magyar Kriminológiai Társaság. Budapest, pp. 44-71. (Hungarian)

[77] Vókó, Gy. (1998): Szabadságvesztéssel nem járó büntetések végrehajtásáról. Magyar Jog 1998/11., p. 660. (Hungarian)

1) The concept of non-custodial sanctions in its neutral formulation does not mean anything else, than that the sanction is not enforced in a closed institution.

2) The usage of alternative sanctions in criminal policy refers to its ability to decrease prison population.

3) Community sanctions indicate that criminal policy relies on community resources during the process of enforcement of the sanction.

The development of community sanctions characterized by steps forward and backward, shows a constant search and change. This search firstly lead to *a)* formation of alternatives of short-term imprisonment, and the appearance of new forms of sanctions, and *b)* the development of effectiveness-augmenting elements, which increase the authenticity of sanctions. At the same time, the new forms of community sanctions occurred together with the rebirth of old forms.

In the first phase of development, the alternatives of imprisonment surfaced in the 1970s and 80s. The search for alternatives and new solutions was urged by the disappointment of the reforming ability of imprisonment and the extreme numbers of prison population, therefore at this time, similar to the first phase, the search aimed at alternatives for short-term imprisonment. Hudson claims that although developed countries were in modern times characterized by reform, rehabilitation and resocialization, there existed a combination in different ways with determent (USA, UK, and West-Germany), deterrence (Scandinavia), or neutralization (France, Italy). It seems that the countries, which emphasized general deterrence were the ones looking for imprisonment substituting solutions, or encouraged suspended sentences, whereas the countries preferring determent and individual deterrence moved towards the application of community based alternative sanctions.[78]

The scepticism surrounding the reforming ability of prisons in connection with the rehabilitation capacity of the prison became a part of formal criminal policy, and the criminal justice systems of almost all European countries began to look for new alternatives. This happened when suspended sentence and community service emerged. The theoretical debate of the 60s emphasized the unwanted effects of imprisonment, such as stigmatization, but at this point, in spite of the aforementioned crisis of experience, the rehabilitation of offenders still had strong support in politics as well as in public opinion. The crisis of resource of the first burst of energy prices in the mid-1970s, similar to other public services of the state, justified the decreasing of costs in criminal justice.

[78] Hudson, B. (1993): Penal Policy and Social Justice. University of Toronto Press, Toronto., p. 20.

The new sanctions had an increasingly double purpose: *(a)* certain forms still served rehabilitation *(b)* other forms aimed at cutting costs by deterrence from a penal way, or by cheaper sanctions. Furthermore, the approach according to which there should be a wide variety of sanctions at hand in the service of individualization resulted in the expansion of the types of non-custodial sanctions. In the theoretical crisis, the authenticity of the rehabilitation ideology was questioned, which not only concerned the frequency of use of the probation as an alternative sanction, but also placed the organization itself into the centre of debate. The harsh philosophical contradiction between the supporting and controlling side of the service and the sanction itself became an issue. The categories of alternative sanctions, intermediary sanctions and community sanctions have been present from this time on.

The third phase of alternative sanctions came about in the 1980s and 1990s. At this time, a number of new phenomena are detectable in the development of these kinds of sanctions. New sanctions appear, which enforce elements of control and supervision to a greater extent, at times exclusively (such as house arrest), and as a consequence of technical development, new more and more sophisticated forms of control develop (such as electronic monitoring). The management approach emerges in criminal justice and consequently, the question of the effectiveness of sanctions becomes important. This explains the fact that in most countries of Western Europe, these new forms of sanctions become applicable on their own right after a so-called pilot, a trial phase. As a result of economic hardships, more and more forms of diversion surface in criminal procedure. The measures of restorative justice appeared among these diversion forms, which do not only decrease costs, but may also serve the constructive ending of the procedure. This era coincided with the requirement of the punishment to be a proportionate and deserved reaction to the offence, which affected the contextual features of alternative sanctions.[79] *The thought on criminal policy in the 1980s pointed towards the enforcement of the repressive element of sanctions.* The re-evaluation of the concepts of punishment and control began in the United States and in some countries of Western Europe already at the beginning of the 1980s, as indicated by the appearance of intensive forms of supervision, such as the regulation in England concerning juvenile offenders. House arrest was introduced in a number of US states in 1983, and adapted later by the Netherlands, Sweden and the UK, and later its combined form with electronic monitoring as a result of technical development.

[79] Wasik, M. – von Hirsch, A., (1988): Non-Custodial Penalties and the Principles of Desert. Criminal Law Review., pp. 555-569.

In the 1990s, labelled „smart penalties" by Garland, a *new generation of punishments appears*, which in part *meet the expectations of the stricter criminal policy*, and in part *reflect the new achievements of technical development*: in the field of non-custodial sanctions, combined sanctions and forms of restraining freedom secured by electronic monitoring emerge. It is unquestionable, that the idea of rehabilitation, which has been a principle thought of criminal justice, has faded. The emphasis of criminal policy has changed: the attention is drawn primarily towards organized crime and new types of offences, towards offenders who make rational decisions, are foreign or belong to a minority group, and finally towards the criminal responsibility of legal persons.[80]

As detectable from the above, *a hundred years after the formation of alternative sanctions it became clear that the road can lead elsewhere (also): the expectations on rehabilitations in penitentiaries have not been met, and it seems as though the world would once again believe in the prison sentence. At the same time, although only on the margin of criminal justice, the system of measures of restorative justice has emerged, making room for new interpretations of resocialization.*

6. The place of alternative sanctions in the sanctioning system of criminal law

The raising expectations regarding the functioning of the justice system (such as the simultaneous securing of the timeliness of procedures, and the safeguarding of guarantees), and the increasing load of crime both burden the functioning of criminal justice. Therefore, the measures of sanctioning offenders within criminal justice and the forms of diversion all attempt to ensure that the system of measures of criminal justice be able to answer, at least partly, to the wide palette of crime. We must naturally never forget that if we try to adjust the sanctioning system to criminal behaviour and offenders, we only take into consideration those offences and offenders, which we know, that is to say non-latent crime. Regarding this characteristic the containment of crime is impossible with only the operating of criminal justice. If one compares the present, even merely the European, sanctioning system with that of 30-40 years ago, one is faced with the phenomenon that the „simple" system of sanctioning using fines, conditional sentences and suspended sentences has disappeared in most countries. The list of sanctions was complemented by non-custodial sanc-

[80] Albrecht, H-J.- van Kalmthout, A. (2002): Intermediate Penalties: European Developments in Conceptions and Use of Non-Custodial Criminal Sanctions. In: Albrecht, H-J.- van Kalmthout, A (eds): Community Sanctions and Measures in Europe and North America. ED. iuscrim, Max-Planck Institute, Freiburg/Breisgau, p. 4.

tions such as intensive probation, community service, compensation, restoration, mediation (agreement between victim and offender), or the suspension of the driver's license. Educational courses and training programs for the learning of consciously influencing behaviour – especially regarding drug and sex offenders should also be mentioned here. Sanctions prescribing supervision and participation have become part of the sanctioning system, as have the participation in probation hostel and daytime activities, curfew, house arrest, electronic monitoring, suspended sentencing with supervision, combined measures (which contains in itself two or more elements), and countless other solutions.

Besides the aforementioned changes, there is another development, which seems extremely important. *In the case of alternative sanctions, civil law „infiltrates" more and more into criminal law and criminal procedural law.* This process has been intensified by the appearance of the measures of restorative justice. Naturally, this loosened the system of criminal law from multiple aspects, but the „loss" seems to be equalled by the „profit" of the effectiveness of using sanctions. The need of solutions of civil law in the sanctioning system is indicated by the attitude studies in connection with criminal law, according to which criminal justice should ensure protection from the offenders of violent crimes, the accountability of offenders, the restoration of the damage caused, the treatment of offenders, and the possibility of participation in the decision process.[81] A lot of research data show that the expectations of citizens concerning punishments are less rigorous than politicians believe.[82]

The Directive of the European Union defines community sanctions as: *„punishments and measures which do not tear the offender away from society, but contain elements of restraining freedom through the imposing of diverse conditions and obligations, which are enforced by an authorized organization."*[83] The malum element of alternative sanctions is therefore the restraining of freedom, labour and supervision; their rehabilitative effect is based upon the reintegrating force of the community. Accordingly, community sanctions serve the defence of society; their aim is to prevent the offender from repeating the offence. Behind every alternative sanction, however, there is the possibility of a custodial sanction, consequently the non-fulfilment of the conditions may result in imprisonment.

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[81] Evans, D.G.(2000): The rebirth of probation: The „Broken Windows" Model. CEP Bulletin, No. 17, Dec., p. 7.

[82] Roberts, J.V. (1992): American Attitudes about Punishment: Myth and Reality, Overcrowded Times, Vol. 3, No. 2.; Begasse, J.(1995): Oregonians Support Alternatives for Nonviolent Offenders, Overcrowded Times, Vol. 6, No. 4.

[83] Recommendation No.R (92) 16

The sanctions belonging to community punishments are not agreed upon in literature, supposedly because „everything" (imprisonment) and „nothing" (probation) can be placed on a wide spectrum. Neither is great emphasis placed on this by the resources, the standpoint of authors can be detected by examining which sanctions are discussed, when dealing with community/alternative sanctions. Bard mentions the suspended sentence, house arrest, and the financial sentence, whereas Lévay discusses the suspended sentence, community service, additional sanctions and measures and financial sentences. Albrecht cites the financial sentence, confiscation, confiscation of assets, suspended sentence, the parole service, compensation, restoration, and electronic surveillance.[84] Zvekic, taking into consideration the new phenomena of crime and criminal justice differentiates between traditional alternative sanctions substituting custodial ones and new types of non-custodial sanctions (confiscation, adjudication, inhibition).[85] Most authors in the United Kingdom group these sanctions based on the British sanctioning system, which is obvious to the extent that the statute itself treats the sanctions organically. The Research on Crime and Justice of the UN differentiates four groups of alternative sanctions: *(a)* non-custodial supervision, including probation as well, *(b)* warning and suspended imprisonment and the conditional sentence, *(c)* financial sentence, *(d)* community service.[86]

In the Hungarian national practice community sanctions can be placed between imprisonment and the financial sentence, irrespective of the fact that the Hungarian sanctioning system is not as polished as certain Western-European systems. I emphasize the contextual elements of non-custodial sanctions, and regard some non-custodial sanctions as community sanctions based on the following conditions:

1. they serve as an alternative to imprisonment, therefore their enforcement is non-institutional, but carried out in the community,
2. they contain elements of restraining freedom and support (although to alternating extent), and
3. there is a continuous and active (personal) relationship with the parole service (as the traditional organization in charge with the supervision of these sanctions), or with non-traditional participants (such as mediation).

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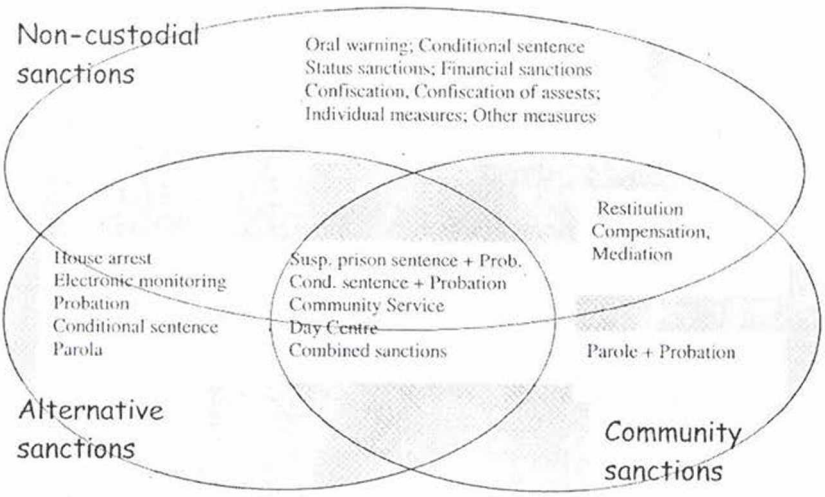
[84] Albrecht, H-J. – van Kalmthout, A. (2002): Intermediate Penalties... ibid. pp. 4-10.

[85] Zvekic, U. (1997): International trends in non-custodial sanctions. In: Ville, R. – Zvekic, U. – Klaus, J.F.(eds): Promoting Probation Internationally. Proceedings of the International Training Workshop on Probation (2-5 July 1997, Valletta, Malta), UNICRI, Publication No. 58. Rome/London, p. 21.

[86] Bondeson, U.V. (1998): Global Trends in Corrections. Presentation at the 12th World Congress on Criminology, Seoul, Korea, Aug. 27, 1998. Manuscript, p. 7.



Community sanctions are situated structurally between imprisonment and fine. The statement, however, raises numerous problems of denotation. Imprisonment deprives the sentenced totally from freedom, and during the enforcement of the punishment, isolates the offender from the community. (I do not take into consideration the temporary leave from the penitentiary in this respect.) Community sanctions are realized in the outside world, but the offender is burdened with a lot of obligations. Community sanctions can be distinguished from custodial sanctions by way that they do not contain a deprivation of freedom; they only have elements of restriction. Fines and other financial sanctions do not take away the freedom of the sentenced person; they nonetheless do contain financial restrictions. However, they miss the immanent element of community sanctions: the active relationship with one of the participants of criminal justice, and they do not require the partaking of community resources. The same element is missing by house arrest and electronic surveillance, where there is a relationship with a participant of criminal justice (either the police, or the parole service), but this is not an active one, much rather the passive behaviour of tolerating the surveillance technique. Therefore, I do not regard them as community sanctions, although they indeed function as an alternative to custodial sanctions. The commitment of the community and its participation in the enforcement are sine qua non conditions of community sanctions, especially those of community service, employment programmes, and sanctions involving the victim, and it is exactly based upon this characteristic that makes the labelling of community sanctions adequate. Consequently, „hybrid" types

of community sanctions should also be mentioned here, which combine custody with the community-part of the sanction, which do not involve the deprivation of freedom.

Most European countries do not consider legal solutions that shorten the duration of the imprisonment or moderate the severity of enforcement (such as weekend-custody, half-closed, half-open institutions, partly suspended sentence etc.) as real alternatives for imprisonment. Most resources of literature nevertheless discuss these sanctions as community punishments, as they reinforce the effect of integration. I also feel that these sanctions, if not formally, contextually do belong to community sanctions. This legal consequence meets all three requirements, because it substitutes custody when the inmate is on conditional release. In this respect, it could be risked that if we consider the capability to substitute imprisonment, conditional release is the „genuine" community sanction, as it actually substitutes imprisonment (at least during the parole phase), which is not so unambiguous in case of other community sanctions. On the other hand, this sanction does not belong to community sanctions, as it is not an independent sanction, but an additional element of the imprisonment sentence – at least in Hungarian criminal law.

The question of parole shows the insecurity of approaches, which characterizes community sanctions. Because of the insufficient theoretical fundament, these sanctions believed to be sanctions of substitution in most countries, they subordinate them to the 'real' sanction, the imprisonment. There is an uncertainty concerning the identification of the aims of community sanctions: they wish to ensure on the one hand the restoration of the consequences of the offence, and on the other hand would like to redress the personal and social problems of the offenders. This is very clearly detectable in the probation sentence. The double duty of the probation officers of treating the offender as a client, offering assistance and support, and as a participant of criminal justice exercising control and supervision, is hardly reconcilable. The support of underprivileged offenders, as they form the majority of the clientele of the probation service, is necessary, but may concur with the expectations of the public for punishment: the sanction should be taking something away from the offender, and not the other way around.[87] The point of view of the law is not at all obvious in this respect, mostly its clear and unambiguous purpose cannot be determined, and the different rationalities undermine the authenticity and application of these sanc-

[87] Comments on the Prisons-Probation Review Consultation Document (Joining Forces to Protect the Public, Home Office). International Centre for Prison Studies King's College London, November, 1998.

tions.[88] The Model Law on Juvenile Justice represents the conceptional confusion: while in many countries community service for juveniles is placed among educational sanctions, this model law treats it as criminal sanction.[89] Because of the above insecurities, judges do not realize the punishing aspect of this sanction, although Point 6 of the European Rules confirms, „that the personal circumstances of the offender should be taken into consideration, but regarding the severity of the crime".

Hamai claims that the parole service is not an outside solution to the inside problems of criminal justice and criminal studies, but a possible frame into which the necessary and applicable measures can be embedded.[90] Consequently, *the content of non-custodial sanctions and the method of enforcement are always determined by the preferred objectives of the current criminal policy. As the immanent element of alternative sanctions is the simultaneous realization of supervision and assistance, they can either be labelled as community treatment, assistance, or as community surveillance.* The central part of *the problem is constituted by the inner philosophical contradiction drawn between the functions of control and social support, one of which is emphasized by changing criminal policies.* At the same time, the British Crime Survey and the survey initiated by the minister of justice of Victoria, Australia indicated that the results of a survey very much depend on the way of posing the question of what citizens think of suitable sanctions. If the question is „What do murderers deserve?" the answer will naturally be „To be hanged!" However, if the person questioned receives information on the case, the circumstances, motives and background, we see that citizens would actually welcome even milder sanctions, than those of the existing sanctioning practice. Not to mention the fact that all studies on victimology confirm that victims assign primary importance to restoration and compensation.

In past times, the objectives connected to the use of non-custodial sanctions changed significantly.[91] New types of criminal sanctions are indeed quite flexible, because of the combination of diverse sanctions or elements of sanctions.

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[88] van Kalmthout, A. (2001) From Community Service to Community Sanctions. In: Community Sanctions and Measures in Europe and North America. Albrecht, H-J. – van Kalmthout, A (eds), ED. iuscrim, Max-Planck Institute, Freiburg/Breisgau, p. 589.

[89] UN Centre for International Crime Prevention (1997): Model Law on Juvenile Justice, Vienna, September. Quoted by: van Kalmthout, A. (2001) From Community Service to Community Sanctions. In: Community Sanctions and Measures in Europe and North America. Albrecht, H-J. – van Kalmthout, A (eds), ED. iuscrim, Max-Planck Institute, Freiburg/Breisgau, p. 589.

[90] Hamai, K. – Ville, R. – Harris, R. – Hough, M. – Zvekic, U.(1995): Probation Round the World: A comparative study. UNICRI, British Home Office, Routledge, London, p. 207.

[91] See: Albrecht, H-J. (2003): Prisons and Alternatives to Prisons in Europe: Changes and Prospects. In: Gönczöl, K. – Lévay, M. (szerk): A bünözés új tendenciái, a kriminálpolitika változásai Közép- és Kelet-Európában. MKT – Bíbor Kiadó, Miskolc, 2004. pp. 179-200.

The disappointment in rehabilitation altered the approach to traditional community sanctions, rehabilitation was replaced by supervision, or at least the application of control elements has strengthened significantly throughout enforcement. The new phenomenon introduced by community service that the objective of rehabilitation seized to be an element of punishment; supervision is combined with disciplinary measures nowadays, which is indicated by the increased rigour of the procedure in case of violation of rules of behaviour. These are the elements that can be „measured" quite well; therefore they can be adjusted to the requirements of the management-approach. The strengthening of the role of the victim not only influenced the content of compensatory sanctions, but serves in many cases to strengthen and discipline the self-control of the offender. The forms of sanctions of treating addicts in the 60s, or rather the rules of behaviour have changed significantly. Therapy and danger-treatment have been replaced by neutralization and risk-control, which is indicated quite amply by the approach of criminal policy towards drug-use and even more towards offenders of sexual crimes.[92] The direction of these changes is detectable from the accessibility of the personal data and address of sex-offenders on the Internet, the duties of the parole service to notify the victim of the release of the offender, the use of ankle-cuffs, and physical punishments in certain US states. *The conscious inclusion of elements of stigmatization and humiliation in punishments can be evaluated as an indication of the decivilization process in the Elias' sense.* I feel that in the mutual dependence of individuals and groups, the return to outside forces of influence, the appearance of such elements in sanctions, and the rapid proliferation of zero-tolerance, is to be regarded as taking a step backward in the phases of civilization, therefore a decivilizational process.

The question arises, which values are given preference by community sanctions, are there, and if so, what values are particularly characteristic of community sanctions. The answer can be found in article 17 of Directive No.R.(2000)22 of the European Union, according to which *„the important purpose of community sanctions is the realization of community reintegration, and the agencies of enforcement must establish an active co-operation with the local community."* The common feature of these sanctions is that they are only operational and effective if the offender is willing to obey the decision, and cooperate throughout enforcement. In this sense they indeed differ from traditional sanctions. Taking this cooperative element into consideration, states generally require the concession of the offender to use community sanctions. There are also indications that this cooperative element is decreasing (e.g. Czech Republic, United Kingdom, Russia, Germany, and Holland). In the United King-

[92] Dickey, W.J. – Smith, M.E. (1999). Five Futures for Community Corrections. In: Rethinking Probation: Report of the Focus Group. Washington, DC: U.S. Department of Justice, Office of Justice Programs.

dom, it was withdrawn because according to the reasoning, other punishments, such as imprisonment or fine, do not require the consent of the offender, either. As community service and parole are sanctions based on a judicial decision, the inclination of the offender is irrelevant. Nevertheless, the majority of European countries still require the consent of the offender in case of community sanctions.

The treatment of the question of consent represents the altered inclinations of criminal policy. The consent of the offender can be interpreted in the way that the offender has a say in the decision-making process. This condition has a very obvious professional reason: it is easier to achieve the aims with a cooperating offender, than with one that resists the enforcement of the sanction. *The abolition of the requirement of consent furthermore indicates, that the offender is excluded from a formerly given right in a time, which values participation democracy as one of the key elements of the fulfilment of democratic rights. The exclusion instead of participation illustrates the changing attitude of criminal policy towards the offender. This coincides with the opposite process of involving the victim to an increasing extent in the decision procedure.*

7. Alternative sanctions in the phases of criminal procedure

The development of the past two decades in Europe is the differentiation of the system of measures for dealing with severe, moderately severe and mild criminality. The new solutions can be detected in two areas:

1) diversion, or solutions from outside criminal justice, or those which provide an exemption from a formal criminal procedure

2) alternative/community sanctions, which provide constructive solutions within the system of criminal justice, which substitute imprisonment and enforce the effectiveness of sanctions.

Diversions and alternative sanctions have reshaped the 'input', 'sanctioning' and 'output' phases of criminal procedure. We are not in an easy situation if we try to systematize non-custodial sanctions clearly and coherently. *The relation between non-custodial sanctions is close and quite unique: we experience more and more that the same measures of restriction and conflict-resolution are present in different forms.* They are embodied by diversion in the input phase, or by community sanctions applied by the court (as an independent sanction, or as a condition of deferment, or as a behaviour rule, etc.), or in the output phase (as parole), the same obligations are nonetheless prescribed in all three.

The input phase of the procedure: diversion

The appearance of diversion in the continental legal system indicates that the principle of legality is interpreted more and more flexibly. The loosening of the principle of legality in continental systems had been initiated by the suspended sentence and juvenile probation, and found it from then on more and more difficult to resist the arguments of rationality: the use of diversion for petty offences. I would not dare to discuss questions requiring the expertise of criminalistics, therefore I shall examine diversion only from the point of view of community sanctions.

The prosecution practice of European countries is determined by the licenses provided for the prosecution service of the given country. Therefore, three different models can be distinguished:

1) The principle of legality in its narrowest interpretation generates the prosecution to be a purely functional agency, the duty of which is to prepare cases for the judicial phase. It is neither entitled to close the case, nor to impose conditions and requirements on the accused. Every case is to be taken to court. This is the case in Ireland.

2) The prosecution service may terminate the procedure – in other words decide whether to indict the offender – but cannot impose conditions, and has no right to apply sanctions. This model prevails in most European countries.

3) Less frequently, the prosecution has discretional powers to decide, whether to close the case under certain conditions, and can even impose sanctions, such as fines.[93]

Preceding the judicial phase, there is a shift from the strict principle of legality in every European country, and there is the possibility of termination in the police or prosecution phase. This possibility has the same result in all the different systems: the number of cases that transfer to the judicial phase decreases significantly. In spite of the wide variety there is a convergence to be experienced in Europe. On the one hand, countries with a traditionally strict approach to the principle of legality move away from it, and increase the flexibility of their legal system; on the other hand countries, which assigned insignificant roles to the prosecution systematically increase the role and authority of the prosecution in their criminal justice system.[94]

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[93] See: Jehle, J.M. (2000): Prosecution in Europe: Varying Structures, Convergent trends. European Journal on Criminal Policy and Research 8: 27–41., Kluwer Academic Publishers.

[94] Jehle, J.M. (2000): Prosecution in Europe... ibid. 27–41.

The transformation of the input phase of the criminal justice system is a result of diverse effects. A hundred years ago theoretical considerations of sanctioning, a few decades ago the increasing workload of courts and the crowdedness of prisons justified the need for reform. Scientific accomplishment also played a significant role in transformation. In order to decrease the stigmatizing effects of formal criminal procedure, the approach of non-intervention was developed, which felt the need of diverting the treatment of petty offences from formal criminal justice. Diversional measures were encouraged by research data, which indicated that labels could be a self-fulfilling prophecy, because labelling the person as a criminal or as dangerous person may encourage criminal behaviour. In the 1970s, the approach of non-intervention led to the decriminalization of numerous crimes and helped to decrease the frequency of imprisonment imposed on the offenders of non-violent crimes. Apart from its obvious advantages, there is great danger in the possible proliferation of control. Cohen pointed out that the dispersal of the social control-net resulted in many people under supervision, who would not have been treated otherwise this way.[95] Hudson also realized that throughout the 1980s „traditionally informal solutions appeared in a new format, in which they made informal into formal".[96] Therefore, programmes of diversion may be dangerous especially in cases of juveniles, because people, who formerly would have only received a warning are obliged to take part.

The diversional measures in the input phase of criminal procedure serve a double purpose. They substitute the custodial measures before the trial (bail, house arrest, electronic surveillance), other forms, however, assist the constructive closing of the case, primarily the treatment of the problem represented in the offence (mediation, compensation, parole, drug-rehabilitation, etc.). The latter, in many respects, have the characteristics of „classic" alternative sanctions with only one exception: it is not the court, which applies them as a criminal sanction.

The reallocation of the sanctioning authority is the most significant change of the past decades. In different countries, diverse solutions exist as to which authority (police, investigating magistrate, prosecution, judge) and in what phase of the procedure may apply the forms of diversion. There is an obvious identicalness, however, that diversion is only possible before the sanction is pronounced. *The process in which non-judicial agencies are bestowed upon „quasi-sanctioning" powers (formerly judicial powers exclusively) is strengthening intensively* (such as Austria, Belgium, The Czech Republic, Denmark,

[95] Cohen, S. (1979): The Punitive City: Notes on the Dispersal of Social Control. Contemporary Crisis. Vol. 3., pp. 339-363.

[96] Hudson, B. A. (1993): Penal Policy... ibid. p. 40.

Finland, Holland, Germany, Norway, Portugal, Scotland). In Europe, the reallocation of this authority is especially intensive in countries, in which the prosecution has a discretional right to commence the procedure (and even more so, where the police has such powers, such as Holland or Malta). As a Hungarian example, we might mention the institution of the postponing of indictment, in which based on the prosecution's decision the offender is compelled to fulfil the same obligations as pronounced by the judge.

The „redistribution" of judicial sentencing practice in the course of diversion is only one indication of the changed balance between the participants of criminal justice. In America the 'strait-jacket' of the court[97] are sentencing guidelines, the use of compulsory minimum-sanctions, and the 2nd and 3rd strike laws. In the Hungarian criminal code this legal consequence was called the medium size of the statutory offence sanction-scale – since then out of force. These kinds of rules all indicate the change of balance among the participants of criminal justice. *The question naturally arises, whether the „regained positions" of the government and legislation mean the unjustifiable strengthening of governmental power in the field of sanctioning. This question is especially significant in the case of diversion, where the 'reallocation of the sanctioning power' happened in favour of criminal justice agencies under government* control, as prosecution *services are under governmental supervision,* except Portugal and Hungary. One might risk claiming that *these rational solutions in the practical sense damage the principle of „justice only through the court", and question the practical realization of the theory of the separation of powers.* Especially taking into consideration that regarding the content of the sanctions and the law-enforcement agencies, there is no difference in their application in the input or output phase, or as a criminal sanction imposed by the court. The tendency is a solemn question, particularly because it can be sensed from the changes of emphasis in criminal policy that governments are dissatisfied with what they feel is a lenient sentencing practice. This vein of thinking can be attacked, as it is clear that regarding diversion, the redistribution of decisional powers is a rational, cost-effective solution considerate of the interests of the offender. It is also true that diversional measures require the confession and consent of the offender, and that may be evaluated as a sign of claiming responsibility. It is, however, also doubtless that in the field of non-custodial sanctions, there is an accumulation and combination of sanctions and strengthening of control elements. Therefore, I express my doubts rather as an open question than a statement.

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[97] See in detail: Rex, S. (2002): The development and use of Community Sanctions in England and Wales. In: Community Sanctions and Measures in Europe and North America. Albrecht, H-J. – van Kalmthout, A (eds). ED. iuscrim, Max-Planck Institute, Freiburg/Breisgau, p.163. (No 10. reference)

Community sanctions in court decisions

The community sanctions applied by the court can be divided into two groups: supervision type and working type sanctions. However, there may be many varieties within these two basic forms. Some combine the two, while others mirror the desirable ratio of the control and support functions with the application of a multitude of rules of behaviour.

The behaviour requirements of probationers are only determined by the creativity of the judges or the prosecution in case of a postponed indictment. Naturally, there are conditions set by the legislator such as the correspondence with the probation service, the obligation to report the change of address or workplace, and the leading of a law-abiding lifestyle. *It is the field of special rules of behaviour, in which the rehabilitational and reintegrative objectives of sanctions are contained, and these are the rules that require specially trained professionals.* Mediation, compensation, the participation in social and educational programmes, the taking part in tension-relief courses, the reduction of alcohol consumption, and so forth are included among these obligations. Nonetheless, these are the programmes that function as 'black holes', as the authority cannot know what exactly will happen throughout the enforcement of behaviour requirements. This is why the necessity of standardizing the programmes has conceptualized, and the English probation service has considerable results in this field.

8. The dilemma of community sanctions: control or support

In the evaluation of the possible effect of the punishment, we must not only be familiar with the addressees, but also with the attitudes of decision making, which may fill the enforcement of sanctions with „content". There is a significant difference between the philosophy of punishment and the practical application of criminal policy. Duff and Garland mention that decision-makers (not only legislators, but also judges) translate the principles of criminal philosophy for themselves; these are, however, intertwined with eclectic elements, which are results of the characteristics of the person, the case or those of the situation wishing to be solved.[98] The relation between theory and practice is even more complicated by the fact that *sanctioning cannot be connected to a specific punishing philosophy, but can be filled with different content along the guidelines of the ruling criminal policy.* So by choosing a sanction, judges do not choose between philosophies of punishment, but adjust the constraints to the cases in practice, which are provided by the application of the given sanction. It

[98] Duff, A. – Garland, D. (eds.)(1994): A Reader on... ibid. pp. 17-19.

is doubtless that sanctions correspond to diverse conditions of sanctioning philosophies that makes them therefore suitable for diverse interpretations. A restraining, preventing, or a depriving content may be attributed to the same sanction. Although a criminal policy of a given nation represents a given philosophy of punishment, it is hardly certain that the sentencing practice, the penitentiary system or the institution system of law enforcement is altered simultaneously. It is well indicated by doubts of the public as well as politicians that in the United Kingdom, the National Standards for the probation service modified by the Criminal Justice and Court Service Act of 2000 require the probation service to automatically suggest a custodial sentence in case of the second, unjustifiable breach. The objective to increase the credibility of community sanctions leads to the establishment of intensive probation programmes, and the significant enhancement of the frequent application of behaviour requirements or special conditions. The prescription of an overly large number of rules of behaviour, however, increases the possibility of violations.

The question therefore is what content and purpose criminal policy assigns to community sanctions. In one of my other works I discussed the process in which rehabilitation ceased to be an objective of criminal policy and how this phenomenon affected the formation of the conditions of community sanctions.[99] In the following, I shall examine how these changes are manifested in the practical realization of community sanctions, and in the practice of enforcing agencies.

Apart from economic necessity, three new phenomena encouraged the loss of belief in rehabilitation. *(1)* The state of crime alarmed both politicians and the public, and resulted in the augmenting expression of the need for harsher punishments. *(2)* Secondly, the growing opposition to the conceptions on rehabilitation arguing that this approach pathologizes the offender, his will is not taken into consideration and provides large room for the abuse of discretional power. *(3)* The third and probably the most significant element surfaced upon research data, which questioned the beneficial effect of rehabilitation on the offender's behaviour. Evaluating studies in the mid 70s could not find ample proof for the continuous and positive change of rehabilitation to the impeding of criminal behaviour. Rehabilitation, which endeavoured to transform the personality of the offender in order to create a law-abiding citizen for the future did indeed malfunction if we look at the rate of recidivism. We must not forget, however, that Martinson[100] revised his point of view in 1979, and since then

[99] See in detail: Kerezsi, K.: Control or support: The role of alternative sanctions in crime control policies. (Post-doctorate thesis) Manuscript. Budapest, 2005 (Hungarian)

[100] Martinson, R. (1992): Symposium on Sentencing: Part II. Hofstra Law Review 7(2). Quoted by: Palmer, T.: The Re-Emergence of Correctional Intervention. Sage Publications, p. 28.

more and more evaluative research shows that even though rehabilitation is no cure for everything, it does produce results under certain circumstances and in case of certain offenders.[101] Even in cases, where community sanctions would not be more effective than imprisonment, there are a number of arguments for the increase of their use. Imprisonment tears family and community relationships apart, and frequently decreases the intention and ability of the offender to take responsibility, not to mention that imprisonment is significantly more expensive than community service or probation. Furthermore, studies increasingly show that with adequately planned and aimed intervention, the recidivism may indeed be decreased, and this intervention is more effective under community circumstances than in custodial settings.[102] These results are not to be underestimated as the same doubts may be raised concerning the effect mechanism of deterrence. Criminal justice is functioning, and still in criminal statistics, first-time offenders form a greater proportion of all known offenders. Can therefore deterrence only be effective in a certain circle of persons, under certain circumstances? But the same question may arise according to the incapacitation. A custodial sentence is only effective, if the offender does not commit a further offence in the penitentiary and if there is no replacement for the imprisoned offender. As L.T. Wilkins says „it would be nice to get rid of the popular belief that more punishment means less crime."[103]

Today's criminal policy constantly changes the system of requirements concerning the enforcing agencies of community sanctions. In historical development, the change of the probation sentence has always been characterized by the alternating ratios of treatment and control, individualization and legality, rehabilitation/reintegration and repression. Therefore, *non-custodial sanctions have always been characterized by a combination of support and control. However, there may be a great variety of ratios; this is why these sanctions are so diverse.* The probation service enforcing community sanctions was originally authorized to exercise professional help; it had a legal obligation of welfare support. Consequently, it is hardly a coincidence that probation and social services became known as organizations that support the offender. The welfare approach placed the greatest emphasis on the personal needs of the offender, and the fact of committing the offence became secondary.

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[101] DiIulio, J.J.Jr.(1992): Rethinking the Criminal Justice System: Toward a New Paradigm. U.S. Department of Justice, BJS Discussion Paper, December, p. 2.

[102] McIvor, G.: The Management of Offenders - Rehabilitation and Community Sanctions http://www.impact.ie/pw/policy.htm

[103] Wilkins, L.T.(1991): Punishment, Crime and Market Force. Aldershot, Dartmouth, Gower Publication.

The criminal ideologies centralizing repression resulted in the greater emphasis of damages and consequences caused by the offence. The weakening of the rehabilitation approach in the enforcement of community sanctions was followed by the consequence that more and more precise criteria are needed in order to evaluate the personal dangerousness manifested in the offence (as well). The former offender-centric approach became an offence-centred one in the practice of rehabilitative intervention, as a result of the modified conditions. The offence is no longer a symptom of problems, but a problem itself, to which it must be reacted. It became important that the offender chooses to break the law, and this choice can be explained by the direct environment and the personal circumstances of the offender. *Criminal justice therefore expects a kind of professional awareness from social workers, which is able to evaluate personal dangerousness, and prognosticate the likeliness of future criminal behaviour.* The social profession must therefore adjust to the change in which the agencies of criminal justice deal with the consequences of crime, instead of its causes. It is no more needed to increase the self-esteem of the offender, or to provide services, which generally enable the offender to become a social citizen. Crime must be decreased and community must be protected. *In relation to the era of practice of rehabilitation, the rate of application of welfare measures has declined significantly, but has been enriched with the increasingly professional and established practice of risk-analysis.* This requirement takes to a greater extent into consideration the interest of the victim than that of the offender. The expectations to acknowledge victims as 'consumers' and 'clients' is increasing for the probation officers: they „may assist victims with the services provided in the form of their testimony concerning the effects of the offence; they can take part in the validation of their rights, and may help the victims rearrange their lives after their becoming a victim."[104]

The changing social circumstances and the functioning principles of criminal justice made possible to realize that the enforcement of community sanctions is not an assistance based on social work, but a real punishment. In accordance, the probation service must re-establish itself, and must rely on its former profile of social work to a lesser extent. The offenders dealt with by the probation service are not pointedly from disadvantageous environments, which need assistance. „Instead of emphasizing rehabilitative methods that meet the offender's needs, the system emphasises effective control that minimizes costs and maximizes security" – states Garland.[105] This may be a slight simplification, as *these new conditions not only mean danger, but also new possibilities,*

[104] Alexander, E. K. – Lord, J. H. (1994): Impact Statements: A Victim's Right to Speak, a Nation's Responsibility to Listen, Washington, DC: Office for Victims of Crime, U.S. Department of Justice.

[105] Garland, D. (2001): The Culture of Control... ibid. p. 175.

and may make the probation service to become a central partaker in restorative justice. Dangers are nonetheless more easily recognizable than the new possibilities. The new English terminology concerning the parole service demonstrates the adjustment to the new conditions: from the 'woolly, cuddly, soft toy' it became a 'sharp, keen-eyed service',[106] which evaluates the seriousness and dangerousness of the offence, enforces custodial sentences, and exercises social control in order to protect the public.

On the long term, this approach fundamentally opposes the 'no-blame' attitude of social work, forces the enforcing agencies of community sanctions to re-evaluate their basic values and attitudes. In this process the professional approach of social work is transformed along the expectations of criminal justice, which expectations are in many ways unfamiliar to the attitudes of social work. Probation services must re-evaluate their ability to enforce sanctions economically, to exercise social control and to replace with these the former practice of rehabilitative elements. *Social work may receive a role in multiple areas of criminal justice,* such as in diversion, release on bail, upon the pre-sentence report of the probation service, the implementing of community sanctions, on the evaluation of failing the payment of financial sentences, the assistance during the custodial sentence, in the preparation of conditional release, and the correspondence on parole. In other words *in every angle, where criminal justice professionals may need the assistance of another profession, which is more familiar with the person, the subject of the procedure, than the jurisdiction deciding on questions of responsibility and sanctioning.* Nonetheless, the new approach is less and less interested in the ability of achievement of the service and social work of the profession, as it de-professionalizes the organization through the strengthening of the control and risk-analysis function. On the other hand, a number of signs indicate that attitudes of social work are hardly transformable: a simultaneous study in the United States, the United Kingdom, and Israel all show that students of social work, in spite of the proliferation of conservative social policy, prefer the paradigm of rehabilitation of the welfare state, and explain social problems with structural reasons.[107]

The triad of anguishes about punishments, effectiveness, and public security lead to the pretence of combining community sanctions. This on the one hand increases the frequency of applying community sanctions, but on the other hand (primarily because of the requirement to apply sentencing guidelines) strongly constrains it. Upon the application of these sanctions, judges are more

[106] Wallis, E. (2001. Nov): CEP Bulletin, p. 4.

[107] Weiss, I. – Gal, J. – Majlaglic, R. (2002): What kind of social policy do social work students prefer? A comparison of students in three countries. International Social Work, Vol. 45, Issue 01.

and more likely to define behaviour requirements, which hardly correspond to the actual situation of the offender.[108] According to the experience of American parole officers, special conditions are applied in most cases of offenders, and in more than 82% of offenders, the decision contained three or more of these conditions. The most frequent one was the prescribing of one or more financial obligations (84%), 61% was the obligation to pay the expenses of probation, 56% were required to pay a fine, and 55 % were obliged to pay the costs of the judicial procedure.[109]

The characteristics of the probationers are very similar on most parts of the world. In 1990, I described the Hungarian situation as „slightly simplifying, probation officers should deal with offenders, who are uneducated, addicts, and need professional, social assistance concerning the person, and the family".[110] The situation has not changed until 1998: „in the population of probationers, starting from 1989 (or at least from that point detectibly) we are witnessing a drastic change of positions: workplaces have disappeared, living conditions worsened, mass homelessness appeared. The number of uneducated, unprofessional, alcoholic, cumulatively deviant offenders with no family background or following a negative model increased."[111] Simon says that the determining factor of the changing conditions of parole practice should be the reaction to disadvantageous situations. The fact that 48 out of 50 of those released are placed under the supervision of the probation service has been partly caused by the disappearance of jobs for the uneducated work force, and the employment of released offenders has become utterly impossible.[112] *Consequently, strange as it might seem, this might increase the need for applying more community sanctions, as the more people are sentenced to custody, the more of them will be released on parole.*

The professionalism needed for enforcing community sanctions

Community sanctions are changing. This change is fundamentally induced by two new factors: *(1)* the conceptualisation of the role of community sanctions (and especially the parole service) in crime prevention, and *(2)* the risk-analysis

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[108] Dickey, W.J. – Smith, M.E. (1999). Five Futures... ibid.

[109] Bonczar, T.P. (1995): Characteristics of Adults on Probation, 1995. (NCJ-164267) http://www.ojp.usdoj.gov/bjs/pub/press/cap95.pr

[110] Kerezsi, K. (1990): A pártfogás dilemmája: kontroll vagy segítő kapcsolat? Esély 5., p. 60. (Hungarian)

[111] Kerezsi, K. – Der, M. (1998): Mennyibe is kerül a büntető igazságszolgáltatás, avagy az alternatív szankciók költségei. In: Kriminológiai és Kriminalisztikai Tanulmányok, 35.k. (Szerk: Irk, F.) OKKrI. Budapest, pp. 47-119. (Hungarian)

[112] Simon, J. (1994): Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990. The Law and Politics, Vol. 4., No. 7 (July) Chicago: University of Chicago Press, pp. 154-55.

concerning the offender's personal dangerousness, and the practical possibilities of its decrease. The former may easily relate to the zero tolerance approach on minor misdemeanours parallel with the redefinition of the professional philosophy of the probation service, and forces that kind of practices which are unfamiliar to their former role. This direction of development might be labelled the 'American model', whereas the second model, the 'British model' transforms this role with the purpose of increasing effectiveness.

Doubtlessly, the successful enforcement of community sanctions depends largely upon the activity of the probation service. Social work fundamentally builds upon face-to-face assistance and individual case management. Besides this, however, forms of community work type problem solving have emerged throughout the years in connection with criminal behaviour, the treatment of addiction, the spending of spare time, etc. These community work methods did not make unnecessary the forms of individual treatment. *During the 1980s, probation services realized that the trust invested in their work had diminished. However, it also became clear that the politically expected new approach in enforcing community sanctions is a huge possibility for the organization itself: it provides appreciation, opens new sources, brings new status, and could strengthen the total position of the organization. It became obvious that in case of the resistance of the probation service, there are other available organizations for the enforcement of these sanctions, as indicated by the British solution of enforcing electronic monitoring, and the American practice of system of bail: participants of the market are willing and able to step into the area of criminal justice.* The question is how the situation can be solved with also preserving the assisting function of the agency, and at the same time adjusting it to the changing expectations. The question is difficult, and the end of the „road" in not yet to be seen, as some parole services are already on their way, whilst others are just „packing to set out" for finding their new way. Is there anything they absolutely must take with them? Or there is no such thing, and practice will create the profession, which hybridises functions of the police with those of social work?

Control and supervision, assistance and support all aim at influencing different dimensions of human behaviour. Meyerson defines the duty of the probation officer as: „to assist the person on probation in leading a law-abiding lifestyle and the successful accomplishment of the sanctions with an authoritive approach, in a way which corresponds both to the expectations of community security, and the rules of the sanctioning authority".[113] The definition makes it absolutely clear that any form of assistance is only to be understood as a means

[113] Meyerson, B.E.(1992): Role definition for the practitioner of correctional supervision: transcending role conflict in theory and practice. In: Hartjen,C.E. – Rhine,E.E.(eds.): Correctional Theory and Practice, Chicago:Nelson-Hall Publ. Quoted by: Junger – Tas, J. (1994): Alternatives to Prison Sentences... ibid. p. 44.

of achieving a law-obedient behaviour, so it is therefore in a subordinate situation. On the other hand, the activity of the probation officer is determined by the decision of the decision-making authority. This, naturally, does not mean that the probation service cannot make a referral to another agency of assistance in case there is a duty not relating to the committing of crimes in the future. It only signifies that the PO can only define his/her activities within the boundaries of the decision made by the judge, the Parole Board, or the prosecutor. Actually, *this restriction indicates that the probation service is part of the criminal justice system.* However, it is also part of the social sphere, therefore functions between the two overlapping fields. *The changes of the past decades resulted in the fact that the primary authorisation is given to the probation service by criminal justice; it must therefore treat the expectations of criminal justice as a priority over those of the social sphere.* However, this does not mean that the elements of social work might disappear from the range of activities of the probation officer. These are the 'things' probation officers must 'preserve', when they are trying to find their new role, and these means of social work must be applied even under stricter circumstances and conditions. This is the only way to achieve that the offenders take responsibility for their actions, face the negative consequences, and compensate for it in some form. That is what community sanctions make well possible, and ensure better solutions on the longer term, much better than imprisonment and financial sanctions. *The probation officers' authorization remained the same, only its extent has been changed, it must still try to prevent future offences with its own measures. The change is that a greater emphasis has been placed on the offence and several new elements.*

9. Community sanctions on the turn of the 21st century

The system of patronage and the development of the probation service has been a milestone in the historical change, which leads from the sanctioning philosophy of the classical school of criminal law to the positivist sanctioning theory. This difference, as of today, is embodied and symbolized by the probation service as a punishment and as a profession. Probation is the only legal institution that remained from positivist legal theory as a 'dinosaur'. We hope its fate will not be extinction. In order to avoid this fate, it must change, as must community sanctions.

The requirement of change has been expressed in many forms, and there are different demands to be identified behind the American and British models. At the same time, the expectation that the system of practicing criminal justice to become transparent is expressed in both, partly because of the safeguarding of the rights of the offender, partly because of the increasing of the restraining effect, and last but not least in order to demonstrate to the tax-paying public the

standard and effectiveness of the criminal justice system. Regarding these factors, *there is a significant difference between the American and the British model.*

1) Community sanctions are endangered in America, and it seems that American practice is preparing the script of 'hopelessness'. „The meaning of probation is to take a walk; it can be interpreted as a zero-sanction. There are simply not enough prison cells to lock everybody up, who needs punishment; we must therefore come up with a solution to make probation a real sanction. ... Community service sounds as though one joined a student-parent association. What we need to talk about is a forced labour as punishment." – said Kleinman.[114] *Leading social politicians express that the rights of offenders hinder effective crime control*: „the Constitutional constraints of the American system provide countless possibilities for offenders to detain the procedure with objections, manipulate the jury, and appeal endlessly against the decision".[115] In the USA, where the best practice program of the probation service (mirroring a 'creative and critical thinking', and innovation), which started in Boston, and in which „police and probation officers patrol the streets together in order to decrease crime"[116] – one is not to expect a lot. In the present situation it seems that the *American criminal policy, under the name of 'community correction', oppresses and colonizes the organizations that implement community sanctions, and gets them to operate as a transmission strap of spreading the control of criminal justice, and degrades the probation officer to a 'technician of criminal justice'.* The role of the probation service in the criminal justice system is determined by the role assigned to it by criminal policy. If probation officers do not want to miss out on the financial boom enjoyed by law-enforcement, they must forget the altruistic roots of probation. During the arguments on the possible clients of the probation service, among the possible answers we can find the community, politicians, the victim, and – at the bottom of the list – the offender, which indicates that the step forward is still open, and the first and foremost clients of the probation service will soon become the victims. It also indicates, however, that the development of community sanctions will be joined by the further augmenting of control measures, and will cause such measures to be applicable and accepted in the field of the private sphere, and overwrite the traditional practices of traditional social control in the already mentioned way.

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[114] Kleiman, M.A.R.(1998): Getting Deterrence Right: Applying Tipping Models and Behavioural Economics to the Problems of Crime Control. In: Perspectives on Crime and Justice: 1998-1999 Lecture Series. NIJ, November

[115] Wilson, J. Q. (1997): Criminal Justice in England and America. Public Interest. Winter(126). pp. 3-14.

[116] Reichert, K. (2002): Police-Probation Partnerships: Boston's Operation Night Light. University of Pennsylvania, Jerry Lee Centre of Criminology, Forum on Crime & Justice.

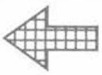
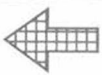
International experience regarding community sanctions shows that non-custodial sanctions are only able to decrease prison population if they are adjusted to a wider, comprehensive criminal policy, which uses other measures to achieve this. *If this intention is missing, community sanctions (similar to the prison) may be filled with content along the lines of any ideology. They can therefore fit into the general tendency of increasing control.* The present directions in sanctioning indicate that principles of sanctioning practice mainly build upon ideas of reprisal, according to which the offender should be punished, the avoidance of dangerous situations should be achieved, and public safety must be ensured, furthermore, the differences in sentencing practice should be diminished. This is, therefore, the script of hopelessness.

2) The script of hope, we trust in spite of the recent changes, is written by the probation officers of the United Kingdom, who realize more and more evidently that all the causes of criminal behaviour cannot be treated within the frame of criminal policy,[117] but an attempt can be made within the frame of the sanction adjusted to the seriousness of the crime, to accomplish the aims of special prevention through individualization, with taking into consideration the interests of the victim and the expectations of the public. *The probation officer is placed between the areas of criminal policy and social policy, even though this mandate seems at times insecure.* It is doubtless that the new approaches of criminal policy need new approaches in probation. We hope that the roots connecting the British probation service to social work make it possible that the balance can be kept between assistance and control in the traditional and most frequently applied enforcement of probation. Hopefully, the professional results acquired through evaluation will develop our knowledge 'in an embryonic state' as to what functions in the decreasing of crime, by which offenders and under what kind of circumstances.

3) The European model of community sanctions cannot yet be cited as a third one. This is because *the European development of community sanctions, although it does show new features, cannot yet be defined as an individual model. In Europe, the process of 'convergence' of traditional and restorative justice is currently detectable.* Traditional criminal justice is indeed moving towards the realization of reparative elements, and away from the idea of rehabilitation, which made possible the better vindication of victims' rights in traditional criminal justice. This process is quite easily observable concerning alternative sanctions. On the European continent, restorative justice is indeed present, which started from the consideration of victims' rights exclusively to those of the offender and finally of the community. In Europe, in the development of models of criminal justice, the phases of (1) rehabilitation, (2) repara-

[117] Gönczöl, K.(1991): Bűnös szegények. KJK, Budapest, p. 115. (Hungarian)

tion, and (3) restoration can be identified. This process has opposite directions in traditional and restorative justice: traditional criminal justice progressed from the rehabilitation phase to the reparative phase, whereas European restorative justice is satisfied with serving the interests of not only the victim with reparation, but also that of the offender instead of the restorative phase.

Traditional criminal justice	Rehabilitation phase		Reparative phase		Restorative phase	
	Rehabilitation phase		Reparative phase		Restorative phase	*Restorative justice*

It may be asked why the requirement of proportionality is not defined as the 'starting point' of traditional criminal justice. This is because this requirement, not doubting its importance, cannot be so unambiguously realized among alternative sanctions, as it is possible in the case of the custodial sentence. During the last decades multiple effects have transformed the content of alternative sanctions. *The fundamental requirement of proportionality is present in alternative sanctions, so that the introduction, content, and definition of the rules of alternative sanctions must be prescribed by legal regulations, and must be adjusted to the seriousness of the offence, the personal characteristics of the offender, and the ensuring of the victims' rights.* This is present in the requirement that judicial or authorities' discretion must be exercised within legal boundaries in case of alternative sanctions, and throughout enforcement the legal guarantees and human rights should be secured. *The requirement of proportionality therefore emphasizes that the assisting activity has limits concerning alternative sanctions*: (1) the frame of activity of the probation officer is determined by the decision of the authority, (2) the application of assisting measures can only be defined within the purpose of achieving a law-obedient behaviour, (3) the probation officer is to define the activities exercised within the characteristics of the ruling of supervision and support. Proportionality, through defining new frameworks for aiming rehabilitation, emphasized its importance, so that sentencing and implementation of sanctions are adjusted to the framework within the power of criminal justice to be exerted. This of course restrains the offender's rehabilitation, nonetheless not making it impossible within the applied sanction.

In spite of the aforementioned, community sanctions are often not convincing, neither for politicians, nor for legislators, nor for the community, which is partly due to the fact that we know little about their effect-mechanism, or more generally about the person. This is why judges apply them for offenders that have committed a less serious crime, and are average, so the use of these sanctions means no particular danger. The results of the evaluation of community sanctions might change this situation. The great deficiency of them is that there are no adequate community sanctions for important groups of offenders (such as addicts, the homeless, members of a minority group), which are also appropriate for diminishing the anguishes of public opinion. This is why they are mostly excluded from the possible subjects for community sanctions – at least in Hungary.[118] Social marginality, disorder excludes many offenders from not only the community, but also from community sanctions. Applying the statements made by Garland and Hudson[119] on the criminology of „us" and „them", community sanctions

1. Have the possible direction of development that they only serve to deal with the wrongdoings of the criminology of „us", whereas offenders and crimes of the „them" group are still treated by custodial sanctions,
2. While the other direction is that for wrongdoings of the criminology of „us", sanctions will be applied that need no formal participation of the agencies of criminal justice (e.g. fine), but for wrongdoings of the criminology of „them" community sanctions will be used, which are strengthened by strong control elements as well as imprisonment.

It may be sensed that the horizon is rather blurred. There are significant changes happening in the criminal justice systems that form the framework of the regulation and application of community sanctions. Based upon the present direction of development in Europe, the convergence of these systems is to be observed, which is characterized by the increasing use of imprisonment, the use of longer-term sentences, the development of non-custodial sanctions, the erosion of welfare and educational elements within the sanctioning system, and privatisation in the criminal justice system.[120] In order for community sanctions to fulfil the great possibilities contained in them, wider social context must not

[118] See in detail: Kerezsi, K. – Gosztonyi, G. – Bogschutz, Z. – Eliás, D. (2003): Probation and Probation Services in the EU accession countries: Hungary (Ch. 5.) In: van Kalmthout, A.– Roberts, J. – Vinding, S.(eds): Probation and Probation Services in the EU accession countries. Wolf Legal Publishers, Nijmegen, pp. 137-181.

[119] See in detail: Garland, D. (2001): The Culture of Control... ibid. p.137.; Hudson, B. (2000): Criminology, Difference and Justice: Issues for Critical Criminology. The Australian and New Zealand Journal of Criminology, Vol. 33., No. 2., August, p. 169.

[120] Pitts, J. (1996): Young People, Crime and Policy. Csp, Critical Social Policy, 16, 4(49), Nov, 83-90.

be left unconsidered during their further development. Emphasis must be placed on new research data to improve the treatment method of these sanctions. Research data must be taken into consideration, which underline that *results could be achieved with the simultaneous application of measures.* In order to ensure the effectiveness of community sanctions, *there is the need on one hand for the application of adequately elaborated and supervised methods of offender evaluation, and on the other hand the respecting of the offender's social membership. The enforcement of community sanctions must send out the message that the purpose of correction is inclusion, but the offender must take steps to achieve this, primarily to restore the consequences of the offence committed.* The criminal policy concerning community sanctions must be based upon approaches that take into account the social situation of offenders and the community they live in. And if all of the above is achieved, Vivien Stern shall be right in claiming that „for most offenders that commit the most frequent offences, the use of community sanctions is the rational measure, in order to achieve protection, the restoration of damages, and find the measures that decrease future criminal behaviour.[121]

SUMMARY

Alternative Sanctions: Rehabilitation, Deserved Punishment, Decreasing of Crime?

KLÁRA KEREZSI

The author states that punishment under the Criminal Code is a form of social control, which is based on other control mechanisms of society. If we have a look at the way alternative sanctions are regulated and enforced, we will find out what a Government thinks of the role of the state, the responsibility of the individual and about the relation between the state and the individual. Since the mid-1990s, criminal policy has shown interest in alternative sanctions and the probation service that puts them into practice. The author examines the purpose of alternative sanctions, how their role has changed in criminal policy, and whether the probation service that enforces them can play a role in extending the limits of control of criminal justice. The essay defines the status and the role of alternative sanctions among the various penal sanctions and analyses the

[121] Stern, V. (1998) A Sin against the future: imprisonment in the world. London: Penguin Books, p. 321.

changes that have occurred in the goals and principles of their practical enforcement. It addresses numerous questions. Do alternative sanctions have to adjust to the well-known requirement of proportionality and if so, to what extent is that possible? What are the characteristics of alternative sanctions in the various stages of criminal justice? Is it important that those sanctions are less expensive for the criminal justice system than imprisonment? Is there a need for taking into consideration the characteristics of the „medium", where those community sanctions are realized? Does it matter how criminal justice approaches the community? What is the impact of new tendencies of criminal policy on the practical enforcement of community sanctions in a society, where talk about „global acceptance" and phenomena of „local exclusion" can be experienced simultaneously? Does participation in the development of public security mean a wider social commitment for the probation service, than what the case was for the traditional, offender-centred probation service? Is it possible to outline the characteristics of an emerging „European" model of alternative sanctions in addition to the American and British ones?

RESÜMEE

Alternative Sanktionen: Rehabilitation, verdiente Strafe, Verringerung der Kriminalität?

KLÁRA KEREZSI

Die Verfasserin ist der Meinung, dass die strafrechtliche Strafe eine auf den sonstigen Kontrollmechanismen der Gesellschaft aufgebaute Form der gesellschaftlichen Kontrolle ist, und in der Regelung und der Vollstreckung der alternativen Sanktionen deutlich erkennbar ist, was eine gegebene politische Macht über die Rolle des Staates, über die Verantwortung des Einzelnen, oder über das Verhältnis zwischen Staat und Individuum denkt. Seit Mitte der 1990-er Jahren schenkt die Strafpolitik den alternativen Sanktionen und der Bewährungshilfe, die deren Vollstreckung sicherstellt, besondere Beachtung. Die Verfasserin analysiert deshalb das Ziel der alternativen Sanktionen und die Änderung ihrer strafpolitischen Rolle, und sie prüft, ob die Bewährungshilfe durch die Vollstreckung der alternativen Sanktionen bei der Ausweitung der Kontrollgrenzen der Strafjustiz eine Rolle spielen kann. Die Studie lokalisiert die alternativen Sanktionen und stellt ihre Rolle unter den strafrechtlichen Sanktio-

nen fest, sie untersucht die Änderungen der Ziele und Prinzipien, welche in der praktischen Vollstreckung zur Geltung kommen. Die Studie sucht nach Antworten auf zahlreiche Fragen. Müssen die alternativen Sanktionen der Anforderung der Proportionalität entsprechen, wenn ja, auf welche Art und Weise sind sie dazu fähig? Welche Besonderheiten weisen die alternativen Sanktionen in den einzelnen Phasen des Strafverfahrens auf? Spielt dabei eine Rolle, dass diese Sanktionen für das System der Strafjustiz eine mindere finanzielle Belastung bedeuten als die Freiheitsstrafe? Müssen die Eigentümlichkeiten des gesellschaftlichen Umfeldes berücksichtigt werden, in dem diese in einer Gemeinschaft vollstreckten Sanktionen angewendet werden? Ist es wichtig, wie die Strafjustiz die Gemeinschaft sieht? Welchen Einfluss haben die neuen Richtungen der Strafpolitik auf die praktische Vollstreckung der Gemeinschaftsstrafen in einem gesellschaftlichen Milieu, in dem die Prozesse der „globalen Annahme" und der „lokalen Ausgrenzung" gleichzeitig zur Geltung kommen? Bedeutet die Teilnahme an der Entwicklung der öffentlichen Sicherheit für die Bewährungshilfe eine weiter gefächerte Verpflichtung als die typische, herkömmliche, täterzentrische Bewährungshilfe? Unter den alternativen Sanktionen gibt es das amerikanische und das britische Modell. Können unter ihnen auch die Besonderheiten eines „europäischen" Modells aufgewiesen werden?

THE IDENTITY OF THE INTERPRETER OF CRIMINAL NORMS

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According to Kelsen, every norm presupposes at least two persons: the norm-positor and the norm-addressee;[1] consequently, when examining the constitutionality of a criminal norm both the norm-positor and the addressee must be scrutinised. Whereas the significance of the author in the interpretative enterprise has been subject to intense study in both German and English, as well as in American literature,[2] almost no attention has been paid to the addressee and/or interpreter from the point of view of legality.[3] It should be noted that a

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1 As Kelsen puts it: „No norm without a norm-positing authority, and no norm without an addressee." Kelsen, H. (1991) *General theory of norms* (trans: Hartney, M.). Oxford: Clarendon Press, 28.

2 On German law see for example Alexy, R. and Dreier, R. (1991) Statutory interpretation in the Federal Republic of Germany. *In:* MacCormick, N. and Summers, R.S. (eds.) *Interpreting statutes: a comparative study*, 73. Aldershot and Brookfield: Dartmouth Publishing Ltd.; Brugger, W. (1994) Legal interpretation, schools of jurisprudence, and anthropology: some remarks from a German point of view. *American Journal of Comparative Law* 42: 395.; Schacter, J. S. (1995) Metademocracy: the changing structure of legitimacy in statutory interpretation. *Harvard Law Review* 108: 592. The huge body of work within the American literature makes it difficult to provide general references. Therefore, only a few examples will be listed here: Ackerman, B. A. (1991) *We the people*. Cambridge, Mass. and London: Belknap Press of Harvard University Press, 142-50; Bork, R. (1990) *The tempting of America: the political seduction of the law*. London: Sinclair-Stevenson, 74-84; Knapp, S. and Michaels, W.B. (1992) Intention, identity and the constitution: a response to David Hoy. *In*: Leyh, G. *Legal hermeneutics: history, theory, and practice,* 187. Berkeley, Los Angeles, Oxford: University of California Press; Smith, S.D. (1993) Idolatry in constitutional interpretation. *Virginia Law Review* 79: 583.

3 This does not mean that the author is not aware of the problem, but the latest findings on legality and interpretation have not been analysed with reference to each other. Consider Ashworth, A. (1991) Interpreting criminal statutes: a crisis of legality? *Law Quarterly Review*. 107: 419.; Ashworth, A. (1995) *Principles of criminal law*. 2nd ed. Oxford: Clarendon Press; New York: Oxford University Press. 67-74; Dworkin, R. (1985) *A matter of principle*. Cambridge, Mass.: Harvard University Press, Chapter 1; Dworkin, R. (1978) *Taking rights seriously (New impression, with a reply to critics)*. London: Duckworth, 131-149; Dworkin, R. (1991) *Law's Empire*. London: Fontana Press. (1st ed. 1986), 313-320, 359-369; Dworkin, R. (1996) *Freedom's law: the moral reading of the American Constitution*. Oxford: Clarendon Press; New York: Oxford University Press. Jeffries raises the issue briefly in his

duality of terms is being used: the 'addressee' and the 'interpreter'. These two concepts are not to be equated. On the contrary, it is part of this argument that a difference should be maintained between the two groups.

Criminal norms are addressed to everybody; no human being can be above them.[4] Thus the universality of criminal law makes every person under its jurisdiction – with some simplification these persons can be described as citizens – an addressee. Is the addressee, that is the citizen, however, the same as the interpreter of the criminal norm? In other words: if one is to decide upon the constitutionality of a criminal norm (statute or precedent), or of an application of a criminal norm, both the constitutional criteria and the criminal norm or its application have to be understood. Does legality place any requirements on the methodology of this understanding? That is, is interpretation to be undertaken with a view to the universality of the addressee?

It is true that the citizen's status, or the judge's role, in interpreting criminal norms has been expounded by other authors to some extent.[5] The issue, how-

article: Jeffries, J. C. Jr. (1985), Legality, vagueness, and the constitution of penal statutes. *Virginia Law Review* 71: 189., 205-223; Kelman, M (1981) Interpretive construction in the substantive criminal law. *Stanford Law Review* 33:591.; Lewisch, P. (1993) *Verfassung und Strafrecht. Verfassungsrechtliche Schranken der Strafgesetzgebung*. Wien: Universitätsverlag.

4 Speaking about a criminal code, Thomas observes that „*politically, a (it) may acquire symbolic significance as an expression of national unity...Morally, (it) may amount to a concrete manifestation of the judgement of the community on the central values, which bind it together and serve notice on the citizen of the limits of permissible behaviour*". Thomas, D: A. (1978) Form and function in criminal law. *In*: Glazebrook, P. R. (ed.) *Reshaping the criminal law: essays in honour of Glanville Williams*, 21. London: Stevens & Sons, 21.

5 Allen, F.A. (1987) The erosion of legality in American criminal justice: some latter-day adventures of the nulla poena principle. Arizona Law Review 29: 385; Arndt, H-W. (1974) Probleme der rückwirkender Rechtsprechungsänderung; dargestellt anhand der Rechtsprechung des Bundesgerichtshofes, des Bundesfinanzhofes, des Bundesarbeitsgerichts und des Bundesverfassungsgerichts. Frankfurt am Main: Athenäum Verlag; Ashworth (1991); Calliess, R-P. (1985) Der strafrechtliche Nötigungstatbestand und das verfassungsrechtliche Gebot der Tatbestandsbestimmtheit. Neue Juristische Wochenschrift 27: 1506; Dannecker, G. (1996) Strafrecht in der Europäischen Gemeinschaft. Eine herausforderung für Strafrechtsdogmatik. Kriminologie und Verfassungsrecht Juristenzeitung 18: 869.; Hillgruber, C. (1996) Richterliche Rechtsfortbildung als Verfassungsproblem. Juristenzeitung 3: 118; Jeffries (1985); Krey, V. (1977) Studien zum Gesetzesvorbehalt im Strafrecht. Eine Einführung in die Problematik des Analogieverbots. Berlin: Duncker & Humblot; Krey, V. (1989) Gesetzestreue und Strafrecht. Schranken richterlicher Rechtsfortbildung, Zeitschrift für die gesamte Strafrechtswissenschaft 101: 838; Lewisch (1993), chapter II.C); Neumann, F. (1991) Rückwirkungsverbot bei belastenden Rechtsprechungsänderungen der Strafgerichte? Zeitschrift für die gesamte Strafrechtswissenschaft 103: 331; Robbers, G. (1988) Rückwirkende Rechtsprechungsänderung. Juristenzeitung 481; Sax, W. (1956) Das strafrechtliche „Analogieverbot": eine methodologische Untersuchung über die Grenze der Auslegung im geltenden deutschen Strafrecht. Göttingen: Vandenhoeck & Ruprecht; Schroth, U. (1983) Theorie und Praxis sub-

ever, of whether an adherence to legality requires some presumption of the characteristics of the addressee has only been dealt with very briefly indeed in the literature.[6]

The first question, which has to be examined, is whether in criminal law legality has any bearing at all on the person of the interpreter *(i)*. In other words, if a criminal norm or its interpretation should conform to the requirements of legality, is it necessary to take into consideration certain attributes of the addressee, and/or the final interpreter? This problem leads to two further points: who is really the addressee of a criminal norm *(ia)*; and what effect does he have on the legality of criminal norms and their interpretation *(ib)*? A methodological point will then also have to be decided. In light of the answers to the questions put forward above, the approach taken by this study can now be stipulated. These issues will firstly be looked at from a theoretical point of view, and then answers that can be found in various jurisdictions will be considered.

The distinction between the two types of rules – those addressed to the general public and those addressed to officials – can be traced back in modern times to Bentham.[7] By generalising Bentham's ideas Dan-Cohen suggests that the rules addressed to officials (which he calls 'decision rules') necessarily imply the

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jektiver Auslegung im Strafrecht. Berlin: Duncker & Humblot; Schreiber, H.-L. (1979) Jewish law and decision-making: a study through time. Philadelphia: Temple University Press; Smith, A. T. H. (1984) Judicial law making in the criminal law. The Law Quarterly Review 100: 46; Strassburg, W. (1970) Rückwirkugsverbot und Änderung der Rechtsprechung in Strafsachen. Zeitschrift für die gesamte Strafrechtswissenschaft 82: 948.; Styles, S. C. (1993) Something to declare: a defence of the declaratory power of the High Court of Justiciary. In: Hunter, R.F. (ed.) Justice and Crime: essays in honour of The Right Honourable The Lord Emslie, M.B.E., P.C., LL.D., F.R.S.E, 211. Edinburgh: T&T Clark; Wang, S. (1995) The judicial explanation in Chinese criminal law. American Journal of Comparative Law 43: 569; Willock, I. D. (1996) Judges at work: making law and keeping to the law. The Juridical Review V: 237; Schmidt-Assmann in Maunz-Düring, Komm. z. GG. Art. 103 Rdnr. 178 et seq. In general see Dworkin (1978), 31-39, 68-71, 137-140; Dworkin, R. (1991) Law's Empire. London: Fontana Press, esp. chapters, 9-10;

6 For example see Ashworth (1991), 441-445; Ashworth (1995), 71-72; Erb, V. (1996) Die Schutzfunktion von Art. 103 Abs. 2 GG bei Rechtfertigungsgrunden: zur Reichweite des Grundsatzes nullum crimen sine lege unter besonderer Berücksichtigung der „Mauerschützen-Fälle" und der „sozialethischen Einschränkungen". Zeitschrift für die gesamte Strafrechtswissenschaft. 108: 266., 274-275; Jeffries (1985), 205-212, Papier H-J. and Möller, J. (1997), Das Bestimmtheitsgebot und seine Durchsetzung. Archiv des öffentlichen Rechts 122: 177., 181; Roxin, C. (1992) Strafrecht, Allgemeiner Teil, Band I. 2nd ed. München: C.H.Beck'sche Verlagsbuchhandlung, 116-117.

7 Dan-Cohen (1984), 625-677, 626. Dan-Cohen cites Bentham, J. (1948) *A fragment on government: an introduction to the principles of morals and legislation* (ed. Harrison, W.). Oxford: Blackwell. The example given by Bentham is „Let no man steal" as a conduct rule, and „Let the judge cause whoever is convicted of stealing to be hanged" as a decision rule. He maintained that the imperative law and the punitory law attached to it are completely distinct. Bentham (1948), 430.

laws addressed to the general public (which he calls 'conduct rules').[8] This in turn would lead to the conclusion that a single set of rules is sufficient to fulfil both functions: guiding official decisions and guiding the public's behaviour.[9] As Dan-Cohen puts it, *„When we say that the judge 'applies' (or 'enforces') the law of theft, we mean that he is guided by a decision rule that has among its conditions of application (1) the existence of a certain conduct rule...and (2) the violation of that conduct rule by the defendant.*"[10] Assuming the validity of this argument, it follows that criminal norms are partly addressed to officials, and partly to the general public.[11]

Nevertheless, acceptance of this approach has not been unequivocal. Kelsen tried to erase the distinction by treating all laws as directives to officials; he saw the sanction (the official legal response to the required behaviour) as a constitutive part of the law, without which the rule would lose its validity.[12] In essence, Austin seems to have attempted the unification of the two norms from the other direction, focusing on conduct rules, by stating that every law or rule is a command.[13]

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[8] Dan-Cohen (1984), 627.

[9] *Id.*

[10] *Id.*, 629.

[11] Dicey, nevertheless emphasised the legal equality of officials and ordinary citizens, and stated that the „universal subjection of all classes to one law administered by the ordinary courts" is the basis of the rule of law. Dicey, A.V. (1959) *An introduction to the study of the law of the Constitution*. 10th ed. Basingstoke: Macmillan Education, 193. The distinction between laws addressed to officials and those to citizens reminds one of the Hartian differentiation, although it is necessary to note that Hart's usage of the terms 'citizens' and 'officials' is somewhat more complicated. Hart, H. L. A. (1994) *The concept of law*. 2nd ed. Oxford: Clarendon Press, 90-8. He points to „two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand...rules of behaviour...must be generally obeyed, and, on the other hand...rules of recognition must be effectively accepted as...standards of official behaviour by its officials." He concludes that the existence of a legal system hinges on the obedience by ordinary citizens and the acceptance by the officials of secondary rules. *Id.*, 116-117.

[12] „The legal norm is applied when the prescribed sanction – punishment or execution of judgment – is directed at behaviour contrary to the norm. The validity of a norm – i.e. its specific existence – consists in the norm to be observed, and if not observed, then applied." Kelsen (1991), 3. In the first addition of his *Reine Rechtslehre* he phrased this concept as follows: „what makes certain behaviour a delict is simply and solely that this behaviour is set in the reconstructed legal norm as the condition of a specific consequence, it is simply and solely that the positive legal system responds to this behaviour with a coercive act." Kelsen, H. (1934) Collective and individual responsibility in international law with particular regard to the punishment of war criminals. *California Law Review* 31: 530., 26. Kelsen maintained this position also in the second revised edition of his Pure Theory. Kelsen, H. (1967) *Pure theory of Law* (trans. Knight, M.). Berkeley Cal., Los Angeles: University of California Press, 33-35. He also put forward a similar argumentation citing as an example the „One shall not steal" maxim and observing that „if at all existent, the first norm is contained in the second, which is the only genuine legal norm." Kelsen, H. (1961) *General theory of law and state* (trans. Wedberg, A.). New York: Russell and Russell, 61.

[13] Austin, J. (1998) *The province of jurisprudence determined* (eds: Campbell, D. and Thomas, P.) Aldershot and Brookfield: Dartmouth, 18.

Whilst the above disagreement might seem to be a purely theoretical exercise, in reality it touches on the very essence of the relationship between legality and the identity of the addressee of the norm. If one accepts the proposition that a criminal norm as a whole is not necessarily addressed to the citizen, then those principles, for example, which can be summarised under the common description of the requirement of foreseeability will take on a very different meaning.

Dan-Cohen, using an example of the defence of duress and necessity, claims that *„far from being a defect, the failure of these rules to communicate to the public a clear and precise normative message is, in light of the policies underlying the defence, a virtue."*[14] Thus, even though courts and commentators have long recognised the vagueness of the defence of duress and necessity,[15] he claims that in this case, as in several other cases, if the ordinary meaning of the words and concepts used by the norm in question could have been understood in the same way as later construed by the court, then the principle of fair warning – that is, legality – was not violated.[16] Similarly, *„the clarity and specificity of decision rules, and hence their effectiveness as guidelines, may be enhanced by the use of technical, esoteric terminology that is incomprehensible to the public at large,"*[17] and this would still not violate legality. It is now apparent that Dan-Cohen's proposition goes to the heart of the matter, and by taking his examples from American jurisprudence, he takes this study further into an examination of the void-for-vagueness doctrine's relevance to the issue under consideration.

In furtherance of his argument, Dan-Cohen uses a model in his enquiries, which he calls 'acoustic separation'. This term describes a situation, which separates the two groups of addressees (general public and officials), those of the conduct and those of the decision rules respectively.[18] The difference between these two classes of addressees is that the 'officials' know the law, or are equipped to find out as far as possible what the law is, whereas the 'general

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[14] Dan-Cohen (1984), 639.

[15] Fletcher, G. (1978) *Rethinking Criminal Law*. Boston: Little, Brown, 17; Fletcher (1985) The right and the reasonable. *Harvard Law Review* 98: 949, 312-316. Samaha refers to the wide variations, which exist between different theorists and jurisdictions on questions of duress. Samaha, J. (1990) *Criminal Law*. 3rd ed., St Paul: West Publishing Co, 235; MPC, Vol. I, 372 *et seq.* The effect of case law on defences was considered by A.T.H. Smith as well. Smith (1984), 63-67. For a German account of the same problem see Erb (1996); Kaufmann, A. (1995), Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht. *Neue Juristische Wochenschrift* 48: 81., 83; Kirchhof, P. (1986) Die Aufgaben des Bundesverfassungsgerichts in Zeiten des Umbruchs. *Neue Juristische Wochenschrift* 23: 1497.

[16] Dan-Cohen (1984), 664.

[17] *Id.*, 668.

[18] *Id.*, 630.

public' is at best a group of average citizens.[19] These two groups shall be, therefore, referred to as 'lawyer' and 'layman' in the following, which emphasises the fundamental reason for this distinction: the layman is ignorant of the law.

Dan-Cohen suggests that the vagueness of laws is the vehicle for 'selective transmission': when part of the norm reaches only one of the groups. Vagueness in this sense might be caused for the following reasons: *1)* the indeterminacy of the standards included in the norm makes it less likely that ordinary citizens will be able to rely on them; and *2)* the existence of a huge body of decisional law, which because of its sheer volume and complexity is intellectually (if not physically) inaccessible to the legally untutored citizen.[20]

It seems that the above two situations can indeed be summarised under the heading 'ignorance of law'.[21] The phrase 'ignorance of law' thus acquires two fundamental meanings. One describes the 'general ignorance of law', that is, ignorance of a branch or of a field of an art or a profession. This can manifest itself, as far as law is concerned, as ignorance of law in general, or as a lack of information about a specific law or legal issue. The other meaning, which will be called 'special ignorance', describes a situation, in which all possible information on a specific legal issue is at hand, and is professionally evaluated, but still results in a belief about the lawfulness of an action, which later proves to be erroneous. This latter type of ignorance may affect, as far as law is concerned, lawyer and laymen alike. Both general and specific ignorance can be blameless or blameworthy. General ignorance of law is, as will be shown, blameworthy in most cases – *ignorantia iuris neminem excusat*. Jeffries suggests a test, the Lambert test, which would mitigate this – as he calls it – the formal lawyers' notice, and introduces a so-called 'reasonable man standard'.[22]

As far as special ignorance is concerned, it is blameless, if a lawyer could not have known or could not have been certain that the act was criminal. This can happen for two main reasons: the law was introduced retroactively, by statute or by judicial decision; or the existing law (statutory or case law) was so vague that it was impossible to ascertain its content with sufficient precision. It will be argued that there is a further type of blameless special ignorance: when the defendant took official advice, acted upon it, and the advice proved to be wrong. In this setting official advice has to be an authority of the state with advisory powers on that certain issue. Erroneous private legal advice will, it seems, not exculpate the defendant. The claims made here will now be addressed in more detail (see Chart 1).

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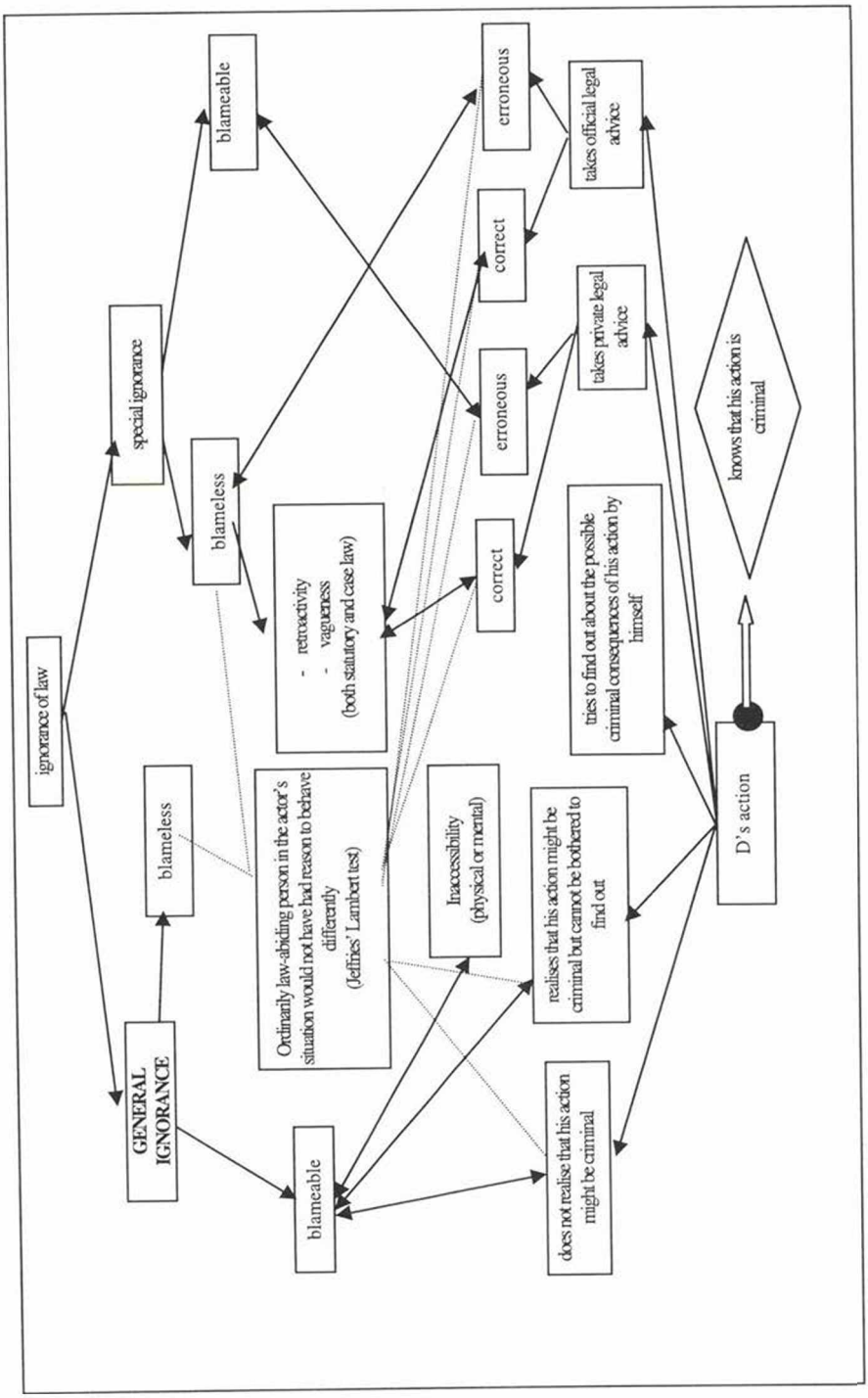
[19] Compare Bentham (1948); Dan-Cohen (1984), 627 *et seq.*

[20] *Id.*, 640.

[21] Dan-Cohen does not draw this conclusion, indeed he later discusses ignorance of law separately. *Id.*, 645.

[22] *Infra* 87.

Chart 1: Ignorance of law and the action of the defendant.



Whilst these two primary meanings of ignorance of law – general ignorance and special ignorance – are indisputably inter-linked, it seems that Dan-Cohen does not give sufficient weight to this duality of meanings, which has considerable consequences in respect of legality.[23] It follows that the primary question is whether legality should be based on the presumption of general ignorance or specific ignorance. Alternatively, is there a more complicated system built on the relationship between ignorance and the addressee's actions? Only after answering this question will it be possible to find solutions to the problems raised by retroactivity and vagueness, and describe the characteristics of the interpreter of a criminal norm.

Before starting with the analysis of the dilemmas outlined above, a further distinction has to be made between ignorance of law and ignorance of fact. Dan-Cohen, whilst not spelling out this typology, discusses the *acting at one's peril* rule, which seems to be treated, in some cases of necessity, as an example of ignorance of fact. Such a situation might arise, for example, if a private citizen uses force to apprehend an escaping felon and by that kills him, and he acts on suspicion that a violent or serious felony has been committed; in such a case for the homicide to be justified it must be shown that his suspicion was correct.[24] The *acting at one's peril* rule is in another form well known to Continental criminal laws. It takes the shape of a so-called *objective condition of liability*, which describes a constituent of a crime, which by its existence makes the offender liable, regardless of whether he knew about this constituent or not (presuming of course that other conditions of criminal liability are met).[25] For example, under Hungarian law one is only liable for the crime of *persuasion to commit suicide,*[26] if the person being persuaded commits or attempts to commit suicide. Liability arises regardless of whether or not the offender knows the result of his persuasive activity. If, therefore, the person whose suicide the offender tried to achieve does not even attempt to kill himself, the offender is not punishable.[27]

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[23] Dan-Cohen (1984), 645 *et seq.*

[24] *Id.*, 643, fn 45 cites Commonwealth v. Chermansky, 430 Pa. 170, 174, 242 A. 2d 237, 240 (1968). It is surprising to compare this case with Dadson. R. v. Dadson (1850) 4 Cox CC 358. See Williams, G. (1961) *Criminal law: the general part.* 2nd ed. Holmes Beach, Florida: Gaunt, 23 *et seq.*

[25] Wiener, A. I. (1995) Alkotmány és büntetőjog. (Constitution and criminal law) *Állam- és Jogtudomány* 1-2: 91., 177. Similarly in Austrian criminal law today there still are elements in the definition of some crimes, which do not have to be covered by the *mens rea* of the offender. Triffterer, O. (1994) *Österreichisches Strafrecht, Allgemeiner Teil.* 2nd ed. Wien, New York: Springer-Verlag., 191-197. The same can be said about German criminal law. Jescheck, H-H. (1978) *Lehrbuch des Strafrechts, Allgemeiner Teil.* 3rd ed. Berlin: Duncker & Humblot, 448-453.

[26] Article 168 Btk.

[27] MBK, 338-339.

The *objective condition of liability*, which belongs entirely to the *actus reus* – that is, the objective side of the offence – is very similar to *acting at one's peril*. Both make the offender's liability subject to the existence of an objective fact of which the offender may not be aware.[28] Whether a defence should consist simply of the external facts – similar to the *objective condition of liability* – or the facts plus the state of mind, is a policy issue.[29] Nevertheless, Dan-Cohen suggests that by looking at the *mens rea* requirement vagueness can be averted.[30] His reasoning shall not be examined in detail here; at this point it is only necessary to observe that he defends his proposition by claiming that the objection to it rests on the fallacy that *mens rea* requirements are based on knowledge of facts and not law.[31]

If *mens rea* requirements were to include knowledge of the law, very few convictions could be achieved. Such a reductionist view of law, limiting it basically to the Ten Commandments, is not only erroneous but also unnecessary. The *mens rea* requirement makes it necessary for the defendant to know the so-called historical facts – that is, those facts of the case, which have a legal consequence. The principle of *ignorantia iuris* simply says that knowledge of the legal implication of those facts or events in most cases is not relevant.[32] Considering Dan-Cohen's example, the *Regina v. Prince*[33] case, it is quite apparent from the unnecessarily complicated opinion of Lord Bramwell that his Lordship merely removes the age of the girl from the sphere of *mens rea* and makes it an *objective condition of liability*.[34] Dan-Cohen hopes to remedy vagueness, but merely removes a component of the crime to the layer of decision rules. Such a trend would, of course, lead ultimately to complete objective liability – that is, strict liability.[35]

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[28] These rules must be distinguished from the *Dadson* principle, which concerns a similar scenario to the *acting at one's peril* rule. *Dadson*, however, introduced a *mens rea* element by holding that „a person making an arrest must know of, or at least suspect, the existence of valid grounds for an arrest" See Smith, J.C. & Hogan, B. (1998) *Criminal law*. 8th ed. London, Edinburgh, Dublin: Butterworths, 36-37; Smith, J.C. (1989) The Law Commission's criminal law bill: a good start for the criminal code. *Statute Law Review* 16: 105., 34-41.

[29] Smith & Hogan (1998), 36.

[30] Dan-Cohen (1984), 662 *et seq.*

[31] *Id.*

[32] Jescheck, H-H.(1969) *Lehrbuch des Strafrechts, Allgemeiner Teil.* Berlin: Duncker & Humblot, 297-299; Triffterer (1994), 270-271.

[33] 2 L.R.-Cr. Cas. Res. 154 (1875) as cited by Dan-Cohen. The case involves a statutory rape.

[34] *Id.*, 174-75.

[35] See Ashworth, A. (1995a) *Principles of criminal law*. 2nd ed. Oxford: Clarendon Press; New York: Oxford University Press, 158-167. Stuart uses the term 'absolute liability', where no fault, merely proof of an act is required. Stuart, D. (1995) *Canadian criminal law: a treatise*. 3rd ed. Scarborough, Ontario: Carswell, 173-181.

It is not possible to accept that the defect of the principle of *acting at one's peril* as a conduct rule (which lies in its inability to prescribe a workable standard of conduct liability)[36] could be cured, if it were to be regarded as a decision rule.[37] Ignorance of facts – describing it, as one should, that is, as mistake of fact[38] – and ignorance of law are not interchangeable, and legality does not allow for easy intercourse between the two.[39] Changing a factual issue into a legal one, and thus changing the mistake of fact into *ignorantia iuris* erodes *mens rea,* and by this violates the culpability principle. The mistake of fact does not have any effect on the identity of the interpreter, but its confusion with ignorance of law obfuscates the issue.

The jurisprudence of the vagueness doctrine as developed in the United States provides some basis to start the enquiry into whether criminal laws should be created and interpreted assuming that the addressee and/or the interpreter is a layman (general ignorance) or a lawyer (specific ignorance). It cannot be the task of this work to examine the void-for-vagueness doctrine in detail, but a few explanatory remarks are essential.

In the United States, courts have long recognised the power to declare legislation unconstitutional on the basis of the doctrine of void-for-vagueness,[40] and

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[36] Dan-Cohen (1984), 643.

[37] In such a case the conduct rule would simply forbid citizens to use deadly force against suspected criminals, but the decision rule would allow a qualified defence predicated on the actual 'success' of the use of force. *Id.*, 644.

[38] Fletcher (1978), 755-58. Fletcher's account on mistake of law accords with Dan-Cohen's analysis of ignorance of law as a defence. Dan-Cohen (1984), 646 *et seq.* For a critical assessment of Fletcher's views see Smith, A. T. H. (1982b) The idea of criminal deception. *Criminal Law Review,* 721.

[39] The claim that legality places requirements on *mens rea* will not be further substantiated in this thesis, because that would greatly exceed the limits of the work. It is sufficient to observe that, as far as English law is concerned, Allan suggests, on the basis of Sweet v. Parsley (1970) AC 132, 152 (Lord Morris), that *mens rea* is in all ordinary cases an essential ingredient of guilt of a criminal offence, which is reflected in the legislative context in the presumption that the court „must read in words appropriate to require *mens rea*" *Id.*, 148 (Lord Reid). See Allan T. R. S. (1993) *Law, liberty, and justice: the legal foundations of British constitutionalism.* Oxford: Clarendon Press; New York: Oxford University Press, 39. Similarly in German law, the principle – „no punishment without culpability" – as far as criminal law is concerned, is rooted in the constitutionally protected right to human dignity and self-responsibility. NJW (1997) 929, 932. In Austrian law whilst the extent of the constitutional protection awarded to the culpability principle is disputed, it is still generally accepted that it is part of the rule of law principle. Lewisch (1993), 156-278.

[40] For a somewhat dated but fundamental discussion of the vagueness doctrine see Amsterdam's note. Amsterdam (1960) The void-for-vagueness doctrine in the Supreme Court. *University of Pennsylvania Law Review* 109: 67. Waldron presents a philosophical approach (Waldron, J. (1994), Vagueness in law and language: some philosophical issues. *California Law Review* 82: 509), whilst Post an economic analysis of the doctrine (Post, R.C. (1994) Reconceptualizing vagueness: legal rules and social orders. *California Law Review* 82: 491). Further

thus the vagueness doctrine has become the operational arm of legality.[41] The vagueness of a criminal norm might violate the principle of legality on several points.[42] However, in this respect, the reason described usually as *fair warning* or *notice* is significant.[43] Lack of fair warning that certain acts will be punished, or that more severe punishment will be imposed has long been regarded by American case law as a 'trap for the innocent',[44] which has meant, as the *Lanzetta*[45] Court put it that *„no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed to what the state commands or forbids."*[46] Similarly, the Supreme Court stated in one of its even earlier decisions, *Connally v. General Constr. Co.*,[47] that *„a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning*

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consider Tribe, L. H. (1988) *American Constitutional Law.* 2nd ed. Mineola, New York: The Foundation Press, 1033 *et seq.*

41 It is generally accepted that there are two rationales for the void-for-vagueness doctrine. Dan-Cohen identifies them as follows: *a)* fair warning rationale; *b)* the other is what he calls the 'power control' rational, which concerns the guiding and controlling judicial decisions [Dan-Cohen (1984), 658]. Jeffries arrives at a similar conclusion [Jeffries (1985), 196-7], and Post observes also that „the doctrine underwrites the clarity of the law's distinction between acceptable and forbidden behaviour, so as both to guide the actions of citizens and to restrict the discretion of government officials" [Post (1994), 491]. The focus on the 'power control' rationale is not only apparent from Justice O'Connor's statement in Kolender v. Lawson. Already in Papachristou v. City of Jacksonville, 105 U.S. 156 (1972), the Supreme Court invalidated an anti-vagrancy ordinance of the city of Jacksonville in Florida. The Court based its decision on the void-for-vagueness doctrine (*Id.*, 162) characterising the ordinance as a vehicle for 'whim' and 'unfettered discretion'(*Id.*, 168) (quotation omitted).

42 Jeffries (1985), 201-212;

43 One of the famous expositions of the fair warning principles was the pronouncement of Justice Holmes in McBoyle v. United States, 283 U.S. 25 (1931) in which the relevant point involved interpreting interstate transportation of a stolen 'motor vehicle' to exclude an aeroplane: „Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, as fair as possible the line should be clear." *Id.*, 27. This expression has also been used by the Model Penal Code [MPC §§1.02. (2) (d)] and by Jeffries in his article [Jeffries (1985), 201, 205-212] and was similarly referred to by Ashworth [Ashworth (1991) 419, 432; Ashworth (1995a), 73]. Note that Thomas describes notice as a purpose of criminal law. Thomas (1978), *supra* 4.

44 United States v. Cardiff, 344 U.S. 174 (1952). *Id.*, 176. Cited also by Jeffries (1985), 205.

45 Lanzetta v. New Jersey, 306 U.S. 451 (1939). In this case the Supreme Court voided a statute, which made it criminal to be member of a gang.

46 *Id.*, 453.

47 Connally v. General Constr. Co., 269 U.S. 385 (1926). This case involved a lawsuit to enjoin certain state and county officers of Oklahoma from enforcing provisions of an Oklahoma statute, which created an eight-hour day for state employees and set out a minimum wage. On the violation of these provisions a penalty was imposed including a fine and /or imprisonment. *Id.*, 388.

and differ to its application, violates the first essential of due process of law."[48] This sentiment of fair warning, therefore, has become a basic element of the due process doctrine enforced through the void-for-vagueness principle,[49] and was also incorporated into the MPC.[50]

The most precise restatement of the vagueness doctrine was rendered by Justice O'Connor for the majority of the Supreme Court in *Kolender v. Lawson*,[51] which struck down a California statute requiring persons who loitered or wandered on the streets to provide credible and reliable identification, and to account for their presence when requested by the police: *„the void-for-vagueness doctrine requires that a penal statute define the criminal offence with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement... Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.*"[52]

As a consequence, a statute might be vague in two different ways: it can be indeterminate and/or inaccessible.[53] A statute is indeterminate, when a significant number of possible situations are neither excluded by it nor included in it.[54] In case of inaccessibility, the question, whether a given situation is within the competence of the statute is believed to have an answer; the defect of the statute lies in the great difficulty of discovering what this answer is. For our present investigation this second shortcoming of a law is of interest, since as Justice Douglas put it, such a situation arises, when the law refers the citizen *„to a comprehensive law library in order to ascertain what acts [are] prohibited.*"[55]

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[48] *Id.*, 391.

[49] The doctrine has developed from the requirement of the Sixth Amendment, that the accused should know the nature of the accusation against him, and also from the general due process protection of the Fourteenth Amendment; it is now firmly rooted in the due process clauses of the Fifth and Fourteenth Amendment See for example Bjerregaard, B. (1996) Stalking and the First Amendment: a constitutional analysis of state stalking laws. *Criminal Law Bulletin* 32: 307, 311. In constitutional adjudication under what is known as the 'chilling effect' doctrine [Columbia Law Review (1969) (Note), 808] a higher standard of scrutiny is applied to statutes, the uncertainty of which may inhibit people from exercising constitutionally protected rights.

[50] As the MPC puts it, „to give fair warning of the nature of the sentences that may be imposed on conviction of an offence" MPC §§1.02. (2) (d).

[51] Kolender v. Lawson, 461 U.S. 352 (1983).

[52] *Id.*, 357. (Citation in the original omitted).

[53] Dan-Cohen (1984), 659.

[54] *Id.*

[55] Screws v. United States, 325 U.S. 91, 96 (1945).

The Supreme Court has recognised two ways of curing an otherwise unconstitutional statute: *a)* by judicial reinterpretation, which would clarify the statute (called 'judicial gloss');[56] and *b)* by a so-called requirement of scienter.[57] The problem with judicial gloss is – as Dan-Cohen claims – that it often remedies indeterminacy only by increasing inaccessibility. This in turn hinders the communicative aspect of the norm to the public, and therefore jeopardises fair warning.[58] This claim has to be explored first.

Dan-Cohen points us to the United States Supreme Court decision of *Rose v. Locke*,[59] in which the Court upheld the constitutionality of a Tennessee statute prohibiting 'crimes against nature' and affirmed its application to an act of *cunnilingus*.[60] He further draws attention to the fact that the majority reasoning was based on analogies and inferences referring to old Tennessee decisions and those of other jurisdictions.[61] This, he purports, *„implies that the defendant could have been expected, before engaging in sexual activities, to canvas the law libraries of various jurisdictions in search of the relevant decisions, and then to anticipate the convoluted process of legal reasoning that ultimately led even Supreme Court justices to opposite conclusions."*[62]

Ultimately, Dan-Cohen reaches the same result as Jeffries, namely that, despite rhetoric to the contrary, the courts frequently do away with fair warning.[63] This, he concludes, might not be detrimental to the fair warning principle, because fair warning and the power control rationale do not apply to the same rules: the former relates to conduct rules, the latter to decision rules.[64] Therefore, vagueness must be examined with a view to the addressee of the relevant rule: *„we must always ask: vague for whom?"*[65]

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[56] See for example R. A. V. v. United States, 120 L. Ed. 2d 305 (1992) in which a group of teenagers burned a cross within the fenced portion of the yard of a black family living in a white neighbourhood. One of the perpetrators was prosecuted under a hate speech ordinance, which he later challenged. This was rejected by the Minnesota Supreme Court, which constructed the St. Paul ordinance in question in such a way that it became restricted to 'fighting words'. For more detail see Gellér, J. B. (1998a) Laws penalising bias speech and their constitutionality in the United States. *Acta Juridica Hungarica* 39: 25. Compare with Dan-Cohen (1984), 658.

[57] One method for the legislature, which has been utilised to mitigate any vagueness challenges and to provide law enforcement and judicial agents with an objective method of judging the defendant's behaviour is to impose a scienter element. Dan-Cohen (1984), 658, fn 28 quoting the appropriate state laws. *Id.* quoting the appropriate state laws. Specific intent elements in anti-stalking legislation usually require that the *actus reus* be intended to place the victim in fear of death or serious bodily injury. Bjerregaard (1996), 312. See also Dan-Cohen (1984), 659.

[58] Dan-Cohen (1984), 659-60.

[59] 423 U.S. 48 (1975).

[60] Id., 49.

[61] Dan-Cohen (1984), 660.

[62] *Id.*

[63] *Id.* Jeffries (1985), 205-211.

[64] Dan-Cohen (1984), 661.

[65] *Id.*

This question highlights the crux of the issue. In answering, Dan-Cohen splits the addressees of the norm by dividing the criminal norm into decision rules and conduct rules. He claims on the basis of his example – the *Locke* decision – that building a judgement on prior judicial interpretations, as was done in *Locke* with respect to the expression 'crimes against nature', is acceptable, if understood as an elaboration on a decision rule.[66] But this does not exactly answer the question, as he himself must acknowledge: the fair warning problem is still unanswered.[67] He only moves the fair warning problem under the accessibility rationale, and suggests the application of the scienter, *mens rea* remedy.

From the point of view of legality, this is untenable. His explanation simply does not answer the problem of inaccessibility by suggesting the *mens rea* approach. Taking the *Locke* decision as an example, he suggests that common usage tied up with conventional morality, and not legal technicalities, will determine people's understanding of the normative message conveyed by the legal proscription of 'crimes against nature'. The court rightly implied that notwithstanding legal ambiguities and complexities, the defendant himself perceived his own conduct in terms of this linguistic and moral category and was, therefore, fairly warned.[68] In order to summarise his analysis of the vagueness doctrine and its cures he uses the table below:[69]

Type of rule	*Interest served by its clarity*	*Language in which it is conveyed*	*Cure for its vagueness*
Conduct	Fair warning	Ordinary language	Scienter (mens rea)
Decision	Power control	Legal language	Judicial gloss

Dan-Cohen finds it plausible that in some cases the law may seek to convey both the normative message expressed by common meanings of its terms, and the message rendered by the technical legal definition of the same terms.[70] Briefly, his idea is that if the ordinary meaning of words and concepts used by the norm in question could have been understood in the same way as later construed by the court, then the principle of fair warning was not violated.

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[66] *Id.*
[67] *Id.*, 662.
[68] *Id.*, 663.
[69] *Id.*, 664.
[70] *Id.*, 652.

The problem is that by this statement he presupposes that: *1)* the concept in question has an ordinary language meaning; *2)* the ordinary language meaning is the same as, or wider than the legal meaning of the term; *3)* the offender was familiar with the law as it stood at the time of his act.

His answer to the first criticism is that conventional morality supplied the meaning of the term 'crimes against nature'.[71] In view of the changing nature of sexual morality[72] – leaving aside the issue of the connection between morality and law – Dan-Cohen's argument cannot be sustained. This he acknowledges, without trying to offer further support to his argument in this respect.[73]

His second presumption cannot be upheld either. The very nature of vagueness is that one cannot tell the actual scope of a definition within the norm. Therefore the second postulate can only be valid, if applied in conjunction with a compulsory strict interpretation by the courts to ensure that their legal understanding is narrower, than the ordinary language meaning of the term in question. This runs counter to the *Locke* decision. Dan-Cohen acknowledges this necessary discrepancy between the official's and the citizen's understanding, and suggests that his approach meets the requirement of the rule of law if *„decision rules are more lenient than conduct rules."*[74] However, such a solution would not only make a general rule out of the 'chilling effect'[75] – that is, it would restrain such activities by conduct rules, which in the end would not be punishable because of the decision rules – but would be untenable in real life,

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[71] *Id.*, 663.

[72] In Bowers v. Hardwick, 478 U.S. 186 (1986) the Supreme Court of the United Sates held with a five–member majority that the Constitution does not protect consensual homosexual sex in the privacy of one's home, upholding thus a charge for engaging in oral sex under a Georgia law punishing sodomy. See Tribe (1988), 1422 et seq. However, in Post v. State, 715 P.2d 1105 (Okl.Cr.1986), rehearing denied 717 P.2d 1151 (1986), cert. denied 107 S.Ct. 290 (1986) the Supreme Court denied certiorari, even though a state appellate court prior to Hardwick had overturned a heterosexual sodomy conviction on the grounds that the federal constitution right to privacy had been extended by the Supreme Court to matters of sexual gratification with respect to heterosexuals (Id., 1109; 1152).

[73] Dan-Cohen (1984), 664.

[74] *Id.*, 671.

[75] See for example Wisconsin v. Mitchell, 485 N.W. 2d 807 (Wis. 1992). In this case the Wisconsin Supreme Court struck down a penalty-enhancement law, which increased the punishment for certain crimes if committed with biased intention. The Court then held that the state's penalty-enhancement statute had violated the First Amendment. *Id.*, 807. One of its reasons was that because speech will often be used to prove an element of bias, statutory regulation would 'chill' speech. This means that speech could be 'self-censored' for fear of civil or criminal liability. *Id.*, 815-817. See also Alexander v. United States, 509 U.S. 544. The concept of chilling effect is also known in England, where Smith refers to it as 'disproportionately inhibiting effect'. Smith, A.T.H. (1984) Judicial law making in the criminal law. *The Law Quarterly Review* 100: 46., 71.

save for a complete acoustic separation.[76] Hiding the defence of duress, for example, from the general public does not work,[77] because it will only be hidden until the first decision relying on it; if it is subsequently hidden, and if it can be altered, it will already upset expectations.

Is it then true that the void-for-vagueness analysis *„address[es] itself to the form of regulation, without reference to the ultimate amenability...of its subject"*?[78] On close examination, the fair warning requirement as applied by the courts is formal.[79] Although, contrary to a widely shared belief, ignorance of law is exculpatory in some cases,[80] the main rule remains that *ignorantia iuris neminem excusat*.

The consequence of this for the present undertaking is that general ignorance of law is not believed to be under the void-for-vagueness doctrine in the United States, and does not fall under the violation of Due Process. Therefore, it is not regarded as excluding criminal liability. This statement is much supported by those exceptions, which cater to an ignorance defence.[81] The cases, where such a defence is admissible involve reliance in good faith on official advice about the law. This official statement on the law moves the ignorance from being general ignorance to special blameless ignorance.

Although Jeffries maintains that *„one would think that a system organized around the requirement of fair warning would have to take into account cases where, through no fault of the accused, such warning was not received,"*[82] as the law stands fair warning equals the hypothetical 'lawyer's notice'.[83] In terms of legality this implies that if a) there is no ignorance about the law on the part of the offender; or a) there is blameworthy ignorance on the part of the of-

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[76] A complete acoustic separation would necessarily involve in reality secret court proceedings, no reason given for judgements and so on. These rules have been widely held as falling short of procedural legality.

[77] Dan-Cohen (1984), 671.

[78] Amsterdam (1960), 67, 113 (emphasis omitted).

[79] Jeffries (1985), 207.

[80] Dan-Cohen presents a convincing table of factors against and for allowing ignorance of law as a defence in the United States [Dan-Cohen (1984), 646]. Jeffries also acknowledges that in some jurisdictions a defence of estoppel bars prosecution, where the government has affirmatively mislead the individual. Jeffries (1985), 208.

[81] See Dan-Cohen's table. *Id.*, 646. Additionally the MPC sets out the basic model for this type of defence [MPC § 2.04(3)(b) (Proposed Official Draft 1962)]. Jeffries refers to New Jersey, which allows this defence under circumstances, where „the actor otherwise diligently pursues all means available to ascertain the meaning and application of the offence to his conduct, and honestly and in good faith concludes his conduct is not an offence in circumstances in which a law-abiding and prudent person would also so conclude." N.J. Stat. Ann. § 2C:2-4(c)(3) (West 1982) cited by Jeffries (1985), 208, fn 55.

[82] Jeffries (1985), 209.

[83] *Id.*, 220.

fender, because he did not seek any legal advice at all; or b) the cause of his blameworthy ignorance is that he did not seek official advice, and the 'private' advice (any legal advice independent of the government)[84] provided for him was erroneous;

then criminal culpability can be imposed, without violating legality under the law of the United States.

This in turn affects our primary question: the identity of the interpreter. The outer limit of accessibility is not determined by the principle that general ignorance is exculpatory – that is, the ordinary citizen must be able to understand the law. The confines of accessibility are drawn between blameworthy and blameless special ignorance, where mistaken official advice, retroactivity and vagueness bar professional foresight of the consequences. These will mark out the ground, which cannot be claimed by criminal norms or their application, if legality is to be heeded. It follows that under the law of the United States the interpreter, as a minimum, must be understood as a professional; and the answer to the question 'vague for whom?' is 'for a lawyer'.[85]

Jeffries strongly criticises this so-called 'lawyer's notice', but is similarly opposed to arguments, which maintain that exculpation for ignorance of the law would *„encourage ignorance where knowledge is socially desirable"*.[86] He advocates a solution that would introduce a new standard, by which the blameworthiness of ignorance could be measured. His test of *„would an ordinary law-abiding person in the actor's situation have had reason to behave differently"*[87] is a narrowed-down version of general ignorance.

To examine the feasibility of such a standard is outside the scope of this work, but a short comment on it at this stage is appropriate. The suggested test is not only extremely vague – which is in itself paradoxical – but seems to move this complex question of culpability onto factual grounds. A hypothetical case will further emphasise these doubts. Let us say that in State A there is no motorway speed limit (for example, Germany), and in State B the motorway speed limit is 130 km/h (for example, Hungary). D drives from State A to State B (through Austria of course), and in State B, whilst overtaking at a speed of 160 km/h collides with car X, which changed lanes in front of D's car. The passenger in car X is killed. The evidence shows that if D had observed the speed limit of

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[84] The most notable example for being held liable under criminal law despite receiving 'private' legal advice to the contrary is the Shaw v. D.P.P. (1962) AC 220.

[85] See Jeffries' critique of this so called 'lawyer's notice'. Jeffries (1985), 220-223.

[86] Perkins (1939), 44; Jeffries (1985), 209-210.

[87] Jeffries claims to read this test out of the decision in Lambert v. California, 355 U.S. 225 (1957). In view of the case this is difficult to agree with, nevertheless, this does not diminish the importance of his suggestion. Jeffries(1985), 211.

State B, he could have slowed down sufficiently to avert collision, and that the driver of car X assumed that D is driving according to the speed limit and adjusted his actions accordingly. D defends himself, relying on a test similar to that advocated by Jeffries.[88] He introduces evidence suggesting that he had not come into conflict with criminal law before, and that the average overtaking speed on motorways in State A is higher than 160 km/h. Additionally, the vast majority of drivers from State A violate the speed limit in State B; moreover, he actually reduced his speed compared to his normal driving habit for safety reasons. He claims that the exact speed limit in State B was unknown to him.

Instead of dissecting the case above, it will be assumed that it speaks for itself. Nevertheless, Jeffries is not alone in his critical view of the vagueness doctrine. The point has been also made in another jurisdiction, which although under strong American influence, resisted the import of the vagueness doctrine. *„It has been clear since the decision of the Canadian Supreme Court in* Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada) ('Prostitution reference') *(1990),*[89] *that there is no similar doctrine in Canada grounded in the principle of fundamental justice guaranteed by section 7 of the [Canadian Charter of Rights and Freedoms].*"[90] In *Lebeau* the court, nevertheless, stated that *„the void-for-vagueness doctrine is not to be applied to the bare words of the statutory provision, but rather to the provision as interpreted and applied in the judicial decisions.*" The protection of the principle of fair notice has still been substantially weakened, because the Canadian Supreme Court and the Ontario Court of Appeal place so much emphasis on clarification through judicial interpretation, and the standards vary from 'persons of common intelligence' to 'jurists of unusual diligence'; the focus is too much on specialised legal knowledge, even though it should not be open to the courts to prescribe *ex post facto* a 'sensible meaning' to vague statutory provisions.[91]

Taking all factors into consideration it seems that, when talking of an ordinary citizen, Canadian criminal law does not actually mean simply an ordinary citizen, but rather a layman taking legal advice if need be.

This approach closely corresponds to the test developed under the European Convention on Human Rights.[92] Articles 8-11 of the Convention set out in their

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[88] There is no such test under Hungarian law. Ignorance of law may be exculpatory, however, under certain circumstances.

[89] (1990) 1 S. C. R. 1123. The case is referred to by Stuart. Stuart (1995), 24.

[90] Stuart (1995), 24.

[91] Trotter (1988) Lebeau: towards a Canadian vagueness doctrine. *Criminal Reports* 62: 183, 183.

[92] It is significant to mention that the void-for-vagueness doctrine attracted judicial attention in Canada, first as an element of the 'prescribed by law' requirement of section 1 of the Canadian Charter of rights and Freedoms. *Id.*

second paragraphs the conditions under which the State may interfere with enjoyment of the rights described and protected by the first paragraphs of the same Articles.[93] These limitations are allowed, if they are *„in accordance with the law"* or *„prescribed by law"*, and are *„necessary in a democratic society"* for the protection of one of the objectives set out in the second paragraph.[94] Whilst on the face of it there seems to be a difference between the formulations of Article 8 (2) *„in accordance with the law"*, and that of Articles 9 (2) – 11 (2) *„prescribed by law"*, in *Malone v. the United Kingdom*[95] the Court confirmed that both formulations are to be read in the same way.[96] Describing them extremely briefly, these two concepts mean that as a minimum the State must ground its interference with protected rights in some specific legal rule, which authorises this interference.[97]

The examination of the relevant jurisprudence of the concept *„prescribed by law"* will enable the finding of an answer to the question of the relationship between legality and the addressee of the criminal norm under Convention law. Legality in this sense, according to the Court, is not satisfied merely by appropriate domestic law-making. It is indispensable that it should conform to the principle of the rule of law, which is expressly mentioned in the Preamble to the Statute of the Council of Europe[98] and the Convention.[99] The notion of 'law' – like most of the Convention concepts[100] – is autonomous.[101] 'Law' has been interpreted by the Court as encompassing a wide range of rules, from delegated regulations[102] to unwritten law.[103] Any such rule must, however, be

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[93] For a historical and theoretical analysis of this type of legal structuring, see Gaete (1993) *Human rights and the limits of critical reason.* Aldershot and Brookfield: Dartmouth Publishing Co., 54-55. The principle of necessary legal grounds in cases of limiting freedoms is well entrenched in continental law. Frowein J. A. and Peukert, W. (1996) *Europäische Menschenrechts Konvention. EMRK-Kommentar.* 2nd. ed. Kehl, Arlington: Engel Verlag, 329.

[94] Harris, D.J., *et al.* (1995) *Law of the European Convention on Human Rights.* London, Dublin, Edinburgh: Butterworths, 285.

[95] Eur. Court H.R., Malone v. United Kingdom (1984) A no. 82.

[96] *Id.*, para. 66. The French text of all relevant Articles is the same : *'prévues par la loi'*.

[97] Eur. Court H. R., Silver and Others v. United Kingdom (1983) A no. 61, para. 86.

[98] See Robertson A. H. and Merrills J. G. (1993) *Human rights in Europe. A study of the European Convention on Human Rights.* 3rd. ed. Manchester and New York: Manchester University Press, 2-3.

[99] Eur. Court H.R., Malone v. United Kingdom (1984) A no. 82, para. 32.

[100] See for example the concepts of 'criminal charge' or 'penalty' in Article 7 (1) of the Convention. Eur. Court H.R., Welch v. the United Kingdom (1995) A no. 307-A, 13, para. 27.

[101] Eur. Court H. R., Sunday Times v. United Kingdom (1979) A no. 30, para 49.

[102] Eur. Court H. R., Barthold v. Germany (1985) A no. 90, para. 48. The rules passed by the Veterinarian Bar were regarded as 'law'.

[103] Eur. Court H. R., Sunday Times v. United Kingdom (1979) A no. 30, para. 47. The Court did not „attach importance to the fact that contempt of court is a creature of the common law and not of legislation". *Id.*

based on the authority of Parliament, because only this will ensure sufficient protection against the executive and will ensure foreseeability.[104] This approach has been criticised for not meeting the requirements of formal legality: that is, it regards as laws even those rules, which have not secured democratic legitimacy.[105]

In addition to the formal legality requirement of democratic legitimisation, the Court added to the notion of 'law' two further conditions, which are best described in the first *Sunday Times* case. For the present purposes only the second of the criteria is of importance. According to this, *„a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."*[106]

It is quite apparent now that under European human rights law legality is already satisfied, if the understanding of the text of the norm requires legal advice.[107] The same is true of common law, which practically is only available through legal advice. The Court specifically addressed this issue inasmuch as it stated that *„it would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law'...this would deprive the common law"* states of the protection provided by paragraph (2) of these Articles and *„strike at the very roots of that State's legal system".*[108]

In *Kokkinakis v. Greece*,[109] whilst examining an alleged violation of Article 7 of the Convention, the Court restated the need for clear definition of criminal norms, but added only that this is satisfied *„where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable".*[110] Additionally, in *Wingrove v. United Kingdom*[111], the Commission

[104] Frowein and Peukert (1996), 329

[105] Van Dijk P. and Van Hoof G.J.H. (1990), Theory and practice of the European Convention on Human Rights. 2nd ed. The Hague: Kluwer., 579. The whole of common law's democratic legitimisation can be questioned on these grounds. They might only be answered by the theory of implied endorsement by Parliament. For discussion see Van Dijk and Van Hoof (1990), 580.

[106] *Id.*, para. 49. Robertson and Merrills observe that this passage of the Sunday Times decision closely corresponds to the ideas expressed by Dicey's account of the rule of law. Robertson and Merrills (1993), 197.

[107] See also Eur. Court H. R., Mark Intern Verlag v. Germany (1989) A no. 165, para. 30.

[108] Sunday Times v. United Kingdom (1979) A no. 30, para. 47.

[109] Eu. Court H. R., Kokkinakis v. Greece (1993) A no. 260.

[110] *Id.*, para. 52. There is no question that under the Convention judge made offences are criminal offences for the purpose of Articles 7 – 11. See for example Eu. Court H. R., S.W. v. the

recalled that in its opinion in the case commonly known as the *Gay News* case,[112] it held that the law of blasphemy as defined by the House of Lords at that time was sufficiently accessible and foreseeable.[113] It also observed that considerable legal advice was available to the applicant.[114] The Court further remarked upon the availability of legal advice,[115] which indicates that both institutions attach importance to the norm being judged from a professional's point of view. This statement should be interpreted in the light of the *Sunday Times* judgement,[116] as indeed the court itself did in *Wingrove*.[117] It is apparent, therefore, that foreseeability and accessibility are satisfied, if the law is accessible to a legal professional and its implications can be foreseen by him through interpretation.

Finally, in *Worm v. Austria*[118] the Court reiterated *„that the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences, which a given action may entail."*[119]

United Kingdom (1995) A no. 335-B and Eu. Court H. R., C.R. v. the United Kingdom (1995) A no. 335-C.; X Ltd and Y v. United Kingdom No 8710/79, 28 DR (1982).

[111] Eur. Court H. R., Wingrove v. United Kingdom (1996), 24 E.H.R.R. 1. The applicant's video work, *Visions of Ecstasy*, was refused a classification certificate on the ground that it infringed the criminal law of blasphemy. Relying on Article 10 of the Convention, he claimed that the refusal violated his freedom of expression. The Court refused his claim.

[112] No., 8710/79, Dec. 7.5.82, 28 D.R. 77 (X. Ltd and Y. v. United Kingdom). In Britain the case is referred to R. v. Lemon (1979) AC 617, (1979) 1 All ER 898, HL. For discussion see for example Feldman, D. (1993) *Civil liberties and human rights in England and Wales*. Oxford: Clarendon Press; New York: Oxford University Press, 694-696; Robertson (1993) *Freedom, the individual and the law*. 7th ed. London: Penguin Books, 248-250.

[113] Wingrove v. United Kingdom, Commissions's Opinion, 24 E.H.R.R. (1996) 1, 17, para., 47.

[114] *Id.*, 18, para., 48.

[115] *Id.*, 26, para., 39.

[116] *Supra* 104.

[117] Eur. Court H. R., Wingrove v. United Kingdom (1996), 24 E.H.R.R. 1, 26, para., 40

[118] Eur. Court H. R., Worm v. Austria (1997), 25 E.H.R.R. 454. In this case „the applicant was a journalist, who investigated and reported on a former Vice-Chancellor and Minister of Finance, who was involved in criminal proceedings. Before the trial court delivered its verdict on the charge of tax evasion, the applicant wrote and had published a highly critical article stating that (former Minister) was guilty. The applicant was charged and convicted pursuant to section 23 of the Media Act, with having exercised prohibited influence on criminal proceedings." *Id.* The Court held that there was no violation of Article 10 of the Convention, which was the subject of the applicant's complaint.

[119] *Id.*, 472, para., 38. The applicant also claimed that although there was a legal basis for his conviction, namely Article 23 of the Media Act, the Vienna Court of Appeal had erred in its finding that his article was calculated to influence criminal proceedings. The Court in *Worm* also stated, therefore, that it is primarily for the national authorities to interpret and apply domestic law. *Id.* See also Chorherr v. Austria (1994) A no. 266-B, paras., 24-25.

It will have been noticed that a not negligible number of significant cases decided by the European Court of Human Rights involved the United Kingdom, or more precisely English law. Although qualms about the common law not qualifying as law under the Convention in general, as well as common law criminal offences not conforming to the Convention in particular, have been laid to rest,[120] the problem of the inherent retrospectivity of the case law system seems to prevent – even after *C. v. D.P.P*[121] – a complete reconciliation with prospectivity in criminal law – that is, a requirement of the principle of legality.[122] This, however, is not singularly a feature of common law; in every legal system *„legitimate interpretation passes by imperceptible shades into so-called illegitimate extension."*[123]

Legality in this respect, as it seems, must be defined with some care in English law.[124] Allan suggests – relying on Hall[125] and authoritative decisions[126] – that in order to understand legality as a condition, which requires that the range of policy represented by a statute should be limited by the actual meaning of the words, the words should be, as far as possible, interpreted by giving preference to the audience's preconceptions and assumptions. It is part of the rule of law that legislation should be construed in the light of constitutional standards and principles. Therefore, legality requires a strict construction of penal provisions, where there is a genuine doubt about their scope.[127]

The principle of strict construction, however, is not only widely disputed as far as its existence and proper application is concerned,[128] but does not clarify the

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[120] The cases Eur. Court H. R., C.R. v. United Kingdom (1995) A no. 335-C and Eur. Court H. R., S.W. v. United Kingdom (1995) A no. 335-B have to be regarded as landmark decisions in this respect.

[121] C. v. D.P.P. (1996) AC 1.

[122] Smith (1984), 46, 47.

[123] Williams (1961), 604.

[124] Allan (1993), 35.

[125] Hall, J. (1960), *General principles of criminal law*. 2nd ed. Indianapolis: Bobbs-Merrill Company, 37.

[126] Allan (1993), 36, fn 63.

[127] *Id.*, 36. Ashworth relying on Jeffries draws attention to the links between strict construction and legality. Ashworth (1991), 432. For an American account consult Jeffries (1985), 198-201, 210. Cross describes the present position by referring to Lord Reid's statement in D.P.P. v. Ottewell, (1970) A. C. 642 that strict construction should be applied if "after full inquiry and consideration, one is left in real doubt". *Id.*, 649. Cross, R. (1995) (eds. BELL, J. and ENGLE, G.) *Statutory interpretation*. 3rd ed. London: Butterworths, 172.

[128] Ashworth points out that the proper role of this principle is much misunderstood (Ashworth (1991), 431-433). Not only Glanville Williams (Williams (1981) Statutory interpretation, prostitution and the rule of law. *In*: Tapper, C.F.H. *Crime, proof and punishment: essays in memory of Sir Rupert Cross*. London: Butterworths, 72; Williams, G. (1983) *A textbook of criminal law*. 2nd ed. London: Stevens, 12), but the Law Commission's report even doubts, whether such a principle exists anymore (*Criminal Law: A Criminal Code for England and*

situation of the addressee. It is possible to understand this principle as one, which says that *„the citizen...is entitled to act in reliance on the existing law – both common and statute – until it is changed with reasonable certainty and precision."*[129]

Such views have been advocated by Glanville Williams, who has claimed that *„criminal law...is not meant for lawyers only, but is addressed to all classes of society..."*![130] One can only agree with the expression of the universality of criminal law, but does it follow as a requirement of legality that the addressee has to understand the message?

Looking at the decision of the House of Lords in *Shaw v. D.P.P.*,[131] which Ashworth describes as the modern apotheosis of the conflict between the non-retroactivity principle and the functioning of criminal law,[132] the answer seems to be no. The case also touches upon the issue of general and special ignorance. Shaw published the names, addresses and nude photographs of prostitutes, and in some cases an indication of their practices. The prosecution indicted Shaw with conspiracy to corrupt public morals, in addition to two other charges, under the Sexual Offences Act of 1956 and the Obscene Publications Act 1959.[133] The House of Lords upheld the validity of the indictment, despite any clear precedents that such an offence actually existed. It reasoned that conduct intended and calculated to corrupt public morals is indictable at common law.[134] Shaw relied on legal advice, on the basis of which he rightly presumed – and not because the advice he was given was mistaken – that his conduct was not criminal.[135]

Wales (Law Com. no. 177, 1989) para. 3.17). Cross arrives to a similar conclusion, at least as far as priority given to the criminalising purpose of the statute is concerned. Cross (1995), 175. Nevertheless, strict construction is still often cited: R. v. Horseferry Road Metropolitan Stipendiary Magistrate, ex. p. Siadatan (1991) 1 All ER 324, 328 (Watkins L. J.). In a sense the guidelines set out in C. v. D.P.P. (1996) 1 A.C. 1. also refer to restrictive construction.

[129] Allen, F. A. (1996) *The habits of legality: criminal justice and the rule of law*. New York: Oxford University Press, 91.

[130] Williams (1961), 582.

[131] (1962) A.C. 220.

[132] Ashworth (1995a), 68. For a detailed discussion on the consequences of this case for morality and criminal law, see Hart, H.L.A. (1963) *Law, liberty and morality*. Oxford: Clarendon Press; Stanford: Stanford University Press, 6-12;.

[133] (1962) A. C. 220-1. Reported also in Crim. L. R. (1961) 468, *et seq.*

[134] (1962) A.C. 220, 282.

[135] „There was evidence that on October 22. 1959, prior to publication, he had taken advice as to whether publication would be legal, and had shown a police officer at Scotland Yard the first issue of the booklet and asked him if it would be all right to publish". Shaw v. D.P.P. (1962) A.C. 223.

For those, who thought *Shaw* was an unfortunate part of legal history, *R. v. R.*[136] came as a surprise. In this case the House of Lords abolished the marital exception to rape with retroactive effect. As A.T.H. Smith points out, there was no doubt that the solution was doubtful: the Criminal Revision Committee decided as recently as 1984 that it could not make a unanimous recommendation on the issue;[137] moreover, the Law Commission had only tentatively, in a Green Paper, recommended that the law in this field should be reformed. Parliament had rejected the opportunity to clear up this difficult question in the Sexual Offences Act 1976, and had not removed a suggestive phrase until the Criminal Justice and Public Order Act 1994.[138] The question, therefore, is not whether the minimum standard of special blameless ignorance is sufficient for legality in English criminal law, but rather whether this minimum is met at all in some cases.

With regard to the cases decided by the European Court of Human Rights, one is justified in stating that legality under English constitutional and criminal law differentiates between the universal addressee and the interpreter – the latter being at best a member of the legal profession.

In most jurisdictions – with the possible exception of the European Court of Human Rights' jurisprudence, which was prudently cautious – there seems to be a gap not only between the citizen and the interpreter, but also between the declaration of the citizen's right to understand criminal law, and the actual constitutionally enforceable requirement of exculpation for blameless special ignorance. Germany is certainly no exception to this claim.

The German Constitutional Court emphasised several times that *„everybody should be able to foresee, which behaviours are forbidden and threatened with penalty"*.[139] In the *Sitzdemonstration*[140] (Picketing) decision the Constitutional Court reiterated its observation that the constitutional requirement embedded in Article 103 II GG compels the legislature to define the conditions of criminal liability in such a concrete manner that the scope and field of application of crime-definitions (*Tatbestand*) should derive from the wording (*Wortlaut*), or at least be recognisable and discoverable through interpretation.[141] The Court

[136] (1992) 1 A.C. 599.
[137] Cmnd. 9212.
[138] Section 142. (3). See Smith (1995), 486, 488.
[139] See for example decisions BVerfGE 78, 374 (382); 47, 109 (120); 73, 206 (234); 75, 329 (341).
[140] BVerfGE 92, 1.
[141] See especially BVerfGE 47, 109; 55, 144 (judgments to which the '*Schwarzfahrer*' decision (Beschl. v. 9.2.1988 – 2 BvR 1907/97 refers. NJW 1998, 1135. The Court in this 1992 decision referred to its prior decisions: BVerfGE, 71 108; 73, 206. A later case, however, enumerated all those decisions, in which the Court spelled out its opinion on this issue:

identified two reasons for this principle. Firstly, it should enable the norm addressee to foresee what behaviour is punishable under criminal law and what punishment might be accorded to it. Secondly, it ensures that the legislature decides beforehand what behaviour deserves a penal response, and not the courts afterwards.[142] The *Badge* decision[143] equates the addressee with the interpreter by stating that everybody should be able to foresee the consequences of his action.[144] These approaches omit the first step in legal interpretation theory: to acknowledge the inescapable necessity of interpretation, and that such will result in an unavoidably complicated body of case law in any jurisdiction.

Nevertheless, referring to two previous cases[145] the Court stated again that the certainty of a criminal statute must be judged primarily on the wording [*Wortlaut*] of the definition of the crime [*Tatbestand*], which should be recognisable and understandable to the addressee.[146] The Court further declared that *„because the object of statutory interpretation can always and only be the statutory text, this represents the standard criterion. The possible word-sense [Wortsinn] of the statute marks the outer limit of allowable judicial interpretation (compare BGHSt 4, 144 [148]). If, as shown, Article 103 II GG demands recognisability and foreseeability of a prescription of punishment or fine for the addressee, than this can only mean that* ***the word-sense must be defined from the viewpoint of the citizen****...If only an 'interpretation' transgressing the recognisable word-sense of the rule leads to the result of punishing a conduct, then this must not burden the citizen."*[147] From this follows another rule of

BVerfG (2. Kammer des Zweiten Senats), Beschl. v. 9.2.1988 – 2 BvR 1907/97, NJW 1998, 1135. This decision identified the following relevant Constitutional Court judgments: BVerfGE 71, 108; 73, 206; 82, 236; 87, 209; 87, 399; 92, 1. *Id.*

[142] *Sitzdemostration* (Picketing) decision, BVerfGE 92, 1. This observation was already made in an earlier decision, the *Badge* judgement (BVerfGE 71, 108, (114)).

[143] BVerfGE 71, 108. German Constitutional Court cases are known by their number and not by any name. For easier comprehension, Anglo-American lawyers in particular attach names to these cases. This tradition has been followed here. In The *Badge* case the constitutional complaint involved a fine imposed on a member of an election committee for refusing to take off a badge saying: „Atomic energy? — No, thanks." The applicable German law made a statutory duty to participate in election committees and to refrain from displaying any sign referring to any political conviction. The applicant refused to remove his badge, reasoning that this did not represent political convictions, rather a humanistic and ethical orientation. *Id.*, 109-110.

[144] BVerfGE 71, 108 (114).

[145] BVerfGE 47, 109 (121); BVerfGE 64, 389 (393).

[146] BVerfGE 71, 115.

[147] *Id.* (Emphasis by author). This decision refers back to BVerfGE 47, 109 (121).

interpretation, namely the priority of arguments based on the colloquial meaning of a term over arguments derived from a technical nomenclature.[148]

The Court addressed the issue of the identity of the interpreter from another angle in the *Berlin Wall Snipers* (*Mauerschützen*) decision:[149] the culpability principle (*Schuldgrundsatz*).[150] The Constitutional Court had already described punishment as a „disapproving reaction of the Sovereign to a culpable [*schuldhaftes*] behaviour",[151] by which the offender is blamed for an unlawful conduct.[152] This principle – 'no punishment without culpability' – as far as criminal law is concerned, is rooted in the constitutionally protected right to human dignity and self-responsibility (*Eigenverantwortlichkeit*) and the rule of law principle set out in Articles 1 I and 2 I GG. These principles must be respected by the legislature, when shaping criminal law.[153] The culpability principle can also be placed in the penumbra of Article 130 II GG as one of its material guarantees.[154] Consequently, the culpability principle, as a principle which essentially defines the extent of the State's penalisation power, has constitutional rank.[155] It places a duty upon courts to impose in individual cases sentences proportionate to the culpability of the offender.[156]

The Constitutional Court went on to say that in cases, in which the offenders were previously living in a legal and social system, which no longer existed at the time of the criminal proceedings against them, and in which the offenders were bound on several levels in a system of order and duty when committing the acts, then their individual culpability must be thoroughly vetted.[157] Significantly, the Constitutional Court also observed that undoubtedly questions can be raised about the ability of the defendants to recognise the criminal quality of their actions, especially in view of the fact that the state leadership of East Germany extended the concept of criminal defence to exculpating the border guards, who shot people at the Berlin Wall. It is, therefore, not self-evident that boundaries of non-criminal activity were apparent to an average soldier. It

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[148] BVerfGE 71, 115; 73, 206 (235 *et seq*). Compare with Alexy, R. (1989) *A theory of legal argumentation: the theory of rational discourse as theory of legal justification* (trans. Adler, R. and MacCormick, N.). Oxford: Clarendon Press; New York: Oxford University Press, 95.

[149] BVerfGE 95, 96.

[150] *Id.*, 131, (140-143).

[151] BVerfGE 26, 186 (204); 45, 346 (351).

[152] BVerfGE 20, 323 (331).

[153] BVerfGE 95, 96 (140). BVerfGE 9, 167 (169); BVerfGE 86, 288 (313). See also Schmidt-Assmann in Maunz-Düring, Komm. z. GG. Art. 103 Rdnr. 165.

[154] *Id.*, 170. Therefore, the definition of a crime and the punishment must be proportionate to each other, according to the notion of justice (BVerfGE 45, 187 (259 *et seq.*); 57, 260 (275)).

[155] BVerfGE 80, 244 (255).

[156] BVerfGE, 95, 96, (140).

[157] *Id.*, 142.

would be – the Court continued – untenable under the culpability principle to explain the obviousness of the criminality of their acts simply by pointing to the severe human rights violation, which their action (objectively) entailed.[158] The BGH in one of the *Berlin Wall Sniper* decisions found that the intentional killing through continuous gun fire of an unarmed escapee, who was – apart from the obvious offence of violating the borders – innocent, was such a horrible act that the violation of the prohibition to kill another human being was apparent and recognisable even to an indoctrinated person.[159] Whilst upholding the decisions of the BGH, the Constitutional Court objected to the obvious lack of a more detailed explanation from the BGH as to why an individual soldier was still able, given the circumstances of his upbringing (indoctrination, etc.), to recognise without dubiety the criminal character of his actions.[160]

The concerns and observations of the Constitutional Court about the culpability principle in its *Berlin Wall Snipers* decision are strikingly familiar to the scienter cure of vagueness applied by the American Supreme Court. Despite the elaborate argument, the disregard for the culpability principle is apparent: not only did the soldiers receive official advice that their action was not criminal, but they were also encouraged by their Government to shoot, and received promotion if they successfully hindered someone's escape. It is quite obvious that contrary to correct official advice they were retroactively punished and the strongest form of blameless ignorance of law was disregarded by the German courts, which effectively imposed absolute criminal liability.

There are two further constitutional principles in German law, which affect the relationship between criminal norm and its addressee. The requirement of certainty (*Bestimmtheitsgebot*) can be deduced from all the sub-concepts of the rule of law principle according to German constitutional theory. It gives priority to written law, because it is by this that citizens can find out for themselves what the law is.[161] Additionally, the *trust protection* principle (*Prinzip des Vertrauensschutzes*) is also part of the rule of law principle, and should be understood as the protection of the individual from the unforeseeable consequences of his action.[162]

It is not only rare historical situations that test the law to its extreme. The question, whether official advice is exculpatory is often raised by the laws on contravention and civil law. The editors of the Austrian General Civil Code (*ABGB*) were able to presume that ignorance of a properly published statute

[158] *Id.*
[159] BGHSt 39, 168 (188 *et seq.*).
[160] BVerfGE, 95, 96, (142).
[161] Papier and Möller (1997), 181.
[162] Neumann (1991) 331, 347.

will not exclude blame.[163] The civil law of today, however, is of the opinion that, with regard to the flood of statutes, ignorance of law and mistake in law in the narrow sense can only be blamed on a person, if knowledge of the law could have been reasonably expected.[164]

Similarly, according to Article 5 of the Statute on Administrative Offences (*VStG*), it is an exculpatory factor, if the offender is not aware of an administrative regulation; he cannot be blamed for this ignorance, if additionally he could not have recognised the unlawful character of his action without knowledge of the administrative regulation in question. The mistaken interpretation of an administrative regulation – that is, mistake of law in the narrow sense – falls under the same heading as ignorance of administrative law.[165]

Any culpability must be based on the refusal to follow the command of criminal law. This, however, presupposes the recognisability of the existence of a command, which does not entail only the mere existence of the command, but also perception of its content.[166] If it is impossible to ascertain the normative content of a criminal norm because of the large number of possible divergent interpretations, the objective unlawfulness of a conduct, which nevertheless breaches the criminal norm may diminish: *„the ascertained high degree of vagueness of the rule deprives the norm of its legal quality*".[167]

On the other hand, there appears to be a contrary development, both in German and Austrian jurisprudence, which is very similar indeed to the 'thin ice' principle set out in English law, but goes even further. A person, who is aware that some authorities in the applicable case law regard a certain activity as unlawful (that is, the precedents are not conclusive, or in other words, the law is vague), but still performs this activity, behaves quasi-intentionally and may not later invoke ignorance or mistake in law as a defence.[168] What is of interest now is that as a principle, and not only under exceptional historical circumstances or in connection with extremely hideous crimes, even correct specialised legal advice cannot exculpate if the vagueness of the law was apparent and the law could have been construed as criminalising the activity in question.[169] Whether

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[163] Balthasar, A. (1995) Rechtsunkenntnis schützt vor Strafe nicht. Zur Frage der Zulässigkeit eines Feststellungsbescheids. *Österreichische Juristen-Zeitung* 50: 776., 776. Balthasar refers to Article 2 of ABGB.

[164] *Id.*

[165] *Id.*

[166] *Id.*, 777.

[167] VfSlg 3130/1956. Referred to by Balthasar (1995), 777, fn 18.

[168] Balthasar (1995), 777.

[169] The application – even if not always explicitly – of the 'thin ice' principle can be identified in decisions as Reg. v. Knuller, (1973) A.C. 435; R v. R. (1991) 1 All E. R. 747; BVerfG, Beschl. v. 10. 1, NJW (1995) 17, 1141; BVerfG, NJW (1990), 3140.

this approach is acceptable is highly disputed. Such a view could rightly be compared to the Nazi laws, which condemned whatever was deserving of punishment according to *„fundamental conceptions of a penal law and sound popular feeling"*, and would condone *Shaw v. D.P.P.*,[170] as Hart has pointed out.[171] If this rule were to be adopted, the very question of whose interpretation should be regarded as a standard, when examining the legality of a criminal norm would become pointless, since only acts performed in good faith following an official's erroneous advice might exculpate the defendant. This would indeed reverse the fundamental principle of the rule of law, which states that behaviour, which is not forbidden is allowed. Instead, there would be a rule under which only expressly allowed behaviour could guarantee freedom from possible criminal consequences. This is completely unacceptable under any notion of legality.

The above presumption is not, however, equivalent to the duty imposed by the case law of concerning administrative law in Austria for the individual addressee to be informed of the law (*Erkundungspflicht*). This requires him to contact the relevant authorities or other professional persons or organisation qualified to give appropriate advice.[172] This also appears to be the principle in criminal law, if one wishes to be certain that the activity to be undertaken will not run contrary to criminal prohibitions. Finally, Lewisch observes that the dividing line between allowed and not allowed interpretation is marked out by the word-limit of the definition of the criminal offence (*Wortlautschranke*). This is for a functional reason: criminal law can exercise its guarantee function if a person already conversant with both the language and the law can define with some certainty the sphere of activity which is definitely not criminalised.[173]

The experience of the jurisdictions examined above leads to two fundamental observations: *1)* as Dan-Cohen suggests, the law is not reducible to a simple rule, not even to a rule stating that ignorance of law is not a defence;[174] *2)* a rule still seems to outline itself, however: there is a minimum excuse for ignorance if, contrary to correct legal advice, consequences could not have been foreseen (retroactivity, vagueness), or ignorance is caused by mistaken governmental advice (officials acting in their official capacity).

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[170] (1962) A.C. 223.
[171] Hart (1963), 12.
[172] *Id.*, 779.
[173] Lewisch (1993), 66.
[174] Dan-Cohen (1984), 647.

This too has a profound impact on this enquiry. It seems that, contrary to the rhetoric of courts and some academic writings, ignorance of law is only constitutionally accepted as exculpating one from criminal liability, when the law is so vague as to disable legal professionals from foreseeing the outcome of the activity in question, or the law has been retrospectively imposed. Addressees of criminal norms are not the same as people, whose understanding of those norms should be scrutinised, when looking at the legality of criminal norms or their application. It is 'professional advice', in the words of the European Court of Human Rights, which indicates best that the legal professional should be the standard in gauging legality of criminal norms. Obviously, laws, which are comprehensible to non-legally educated persons, do not raise questions of constitutionality in this respect. Suggestions that all criminal laws must be comprehensible to the average citizen must be discarded as lacking understanding of the theoretical basis of the norm-interpretation. Similarly, views, which would limit legality to the specialised understanding of officials of the government, are contrary to the basic principles of the rule of law.

It follows that the methodologically correct approach is not to examine a criminal law from an ordinary citizen's point of view. This would lead to a paradox, where one would have to ask what is meant by an 'ordinary citizen' in the estimation of an ordinary citizen. Secondly, to use the standard suggested by Jeffries, the question *„would an ordinarily law-abiding person in the actor's situation have had reason to behave differently?"*[175] equates criminal law with the majority's morality. Not disclaiming D. Smith's argument on the idolatry of constitutional adjudication, it is correct to state that a Dworkinian moral reading of a constitution[176] does not amount to a majoritarian imposition of values,[177] be that in the form of judicial guessing of an ordinary law-abiding person's beliefs.

[175] Jeffries (1985), 220.

[176] In his understanding moral reading treats the „Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments" Dworkin, (1996), 3; Dworkin (1991), 373-392; Dworkin (1978), ch. 5.

[177] Hart (1963).

SUMMARY

The Identity of the Interpreter of Criminal Norms

BALÁZS J. GELLÉR

The significance of the author in the interpretative enterprise has been subject to intense study in legal literature, however, almost no attention has been paid to the addressee of a norm from the point of view of legality. Criminal norms are addressed to everybody; no human being can be above them. Thus, the universality of criminal law makes every person under its jurisdiction an addressee. A question then has to be asked: if one is to decide upon the constitutionality of a criminal norm, or the application of a criminal norm, both the constitutional criteria and the criminal norm or its application have to be understood. Does legality place any requirements on the methodology of this understanding? That is, is interpretation to be undertaken with a view to the universality of the addressee? In other words, if a criminal norm or its interpretation should conform to the requirements of legality, is it necessary to take into consideration certain attributes of the addressee, and/or the final interpreter? This problem leads to two further points: who is really the addressee of a criminal norm; and what effect does he have on the legality of criminal norms and their interpretation? This study tries to find an answer to these questions, and also looks at the problem of *ignorantia iuris neminem excusat,* as it is presented at the crossroad of interpretation and legality of criminal norms.

RESÜMEE

Die Identität des Auslegers von strafrechtlichen Normen

BALÁZS J. GELLÉR

Die Bedeutung des Autors im Unternehmen der Rechtsauslegung wurde in der Rechtsliteratur bereits ausführlich untersucht, dem Adressaten der Norm wurde jedoch aus dem Aspekt der Gesetzlichkeit bisher kaum Aufmerksamkeit geschenkt. Strafrechtliche Normen sind an alle adressiert, kein Mensch kann über ihnen stehen. Die Universalität des Strafrechts macht jede Person in seinem Zuständigkeitsbereich zum Adressaten. Dann stellt sich jedoch die Frage: falls

über die Verfassungsmäßigkeit, oder die Anwendung einer strafrechtlichen Norm entschieden werden soll, müssen sowohl das Kriterium der Verfassungsmäßigkeit, als auch die strafrechtliche Norm, oder ihre Anwendung richtig verstanden werden. Stellt die Gesetzlichkeit irgendwelche Anforderungen an die Methodologie dieses Verstehens? Das heißt, soll die Interpretation die Universalität des Adressaten vor Augen halten? Mit anderen Worten, wenn eine strafrechtliche Norm oder ihre Auslegung die Anforderungen der Gesetzlichkeit erfüllen soll, sollten dabei gewisse Eigenschaften des Adressaten, und/oder des endgültigen Auslegers in Erwägung gezogen werden? Dieses Problem leitet zu einer anderen Frage über: wer ist der tatsächliche Adressat einer strafrechtlichen Norm, und was für einen Einfluss übt er auf die Gesetzlichkeit der strafrechtlichen Normen und deren Auslegung aus? Diese Studie versucht eine Antwort auf diese Fragen zu finden und befasst sich mit dem Problem *„ignorantia iuris neminem excusat"*, so wie es an der Kreuzung von Auslegung und Gesetzlichkeit der strafrechtlichen Normen erscheint.

ZWEI TERRAINS DES DEZISIONISMUS BEI CARL SCHMITT: AUF DER MAKROEBENE DER SOUVERENITÄT UND AUF DER MIKROEBENE DES RICHTERLICHEN URTEILS

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Unser Verfasser Carl Schmitt ist einer der herausragenden Denker der Gesellschaftswissenschaft des vergangenen Jahrhunderts, insbesondere hinsichtlich der auch in Ungarn besonders geschätzten Rechtstheorie, der Staats- und Politiktheorie, sowie des Verfassungsrechts. Die Lektüre seiner Werke ist ein intellektuelles Erlebnis, seine Sachkenntnis und Fähigkeit zur Synthese sind überwältigend. Zugleich ist seine Begrifflichkeit und sein Scharfsinn nicht ganz frei von einem gewissen Situationalismus, also von der theoretischen Durchleuchtung der aktuellen Situationen und von der sich auf sie beziehenden programmatischen Arbeit. Abgesehen von einer staats- und rechtsphilosophischen Arbeit aus dem Jahre 1914 hat Schmitt keine Staatstheorie im traditionellen Sinne mehr verfasst, er hat jedoch – als durch und durch situativ denkender Mensch – nicht nur über die Entwicklung der verfassungsmäßigen Situation der Weimarer Republik reflektiert, sondern die daraus gewonnenen Erkenntnisse zumeist auch nach theoretischen und theoriegeschichtlichen Gesichtspunkten systematisiert. In seinem Sprachgebrauch bedeutet Staatstheorie niemals irgendeine abstrakte Theorie, sondern eine theoretische Reflexion über eine gegebene Situation in einer konkreten staatlichen Ordnung. Eine gewisse Ausnahme davon bildet lediglich sein Werk „Der Begriff des Politischen". Dieses ist nämlich durch den überzeugten ideellen Kampf gegen den Liberalismus, den Pluralismus sowie gegen das frühsozialistische, marxistische Denken gekennzeichnet. Es ist allgemein bekannt, dass Schmitt in seinem intellektuellen Kampf – in der weisen Einsicht, dass es sich lohnt, von seinen ernsthaften Gegnern zu lernen – immer als katholischer, nationaler und konservativer Denker hervortrat, in gewissen Zeitphasen auch als Sympathisant des deutschen Nationalsozialismus oder als Person, die sich mit diesem geradewegs identifizierte. Gemäß seinem Identitätsbewußtsein, das er im Winter 1945/1946 zum Ausdruck brachte, offenbarte er sich als erbärmlicher, unwürdiger, aber doch

authentischer christlicher Epimetheus, der – worauf Lajos Cs. Kiss hingewiesen hat – „in der politisch-technischen Modernität die europäische Menschheit gerne mit einer einzig möglichen und gültigen Weisheit beglückt hätte, um das Christentum und den Geist des westlichen Rationalismus für sie zu retten" (Kiss, 2002, S. 282.). Die Beglückung blieb aus, die Welt kam aber dennoch – unter nicht geringem Leid und Opfer – davon. Die Schmitt'sche *Gegenreaktion* gegenüber der sozialistische Reaktion auf die Krise des Liberalismus und den philosophischen Agnostizismus in der Zeit zwischen den beiden Weltkriegen bewegte sich auf spezifisch deutschem Terrain und blickte stillschweigend zurück, in Richtung auf die Bewahrung der absoluten Souveränität des monarchischen Staatsideals. Die dramatischen Entwicklungen im Deutschland der Zwischenkriegszeit, wo der Wandel der Staatsform vom Kaisertum zur Republik inmitten von heftigen inneren und äußeren politischen Auseinandersetzungen und Klassenkämpfen, sowie von revolutionären Wellen erfolgte und wo sich die Stabilisierung der neuen bürgerlich-demokratischen Ordnung – bis zum Ausbruch der Krise von 1929/1933 – als sehr kurzlebig erwies[1], warfen mit paradigmatischer Kraft eine Vielzahl von Fragen der Staats- und Politiktheorie, des internationalen Rechts und der Rechtstheorie auf. Hinter den Leistungen, die Schmitt auf diesem Wissenschaftsgebiet erbrachte, stehen also die Herausforderungen der intellektuellen Aufarbeitung einer beispiellos ereignisreichen historischen Phase.

Gehen wir von der auf die Makroebene ausgerichteten Problemstellung Schmitts aus, die wir als das eine Terrain seines Dezisionismus betrachten können. In seinem Werk „Politische Theologie" von 1922 gründete er seine Kritik an der Rechtsstaatlichkeit auf dem Ausnahmezustand, der außerordentliche Maßnahmen erfordert und – im Gegensatz zum Notstand – verfassungsmäßig geregelt ist. „Er [der Souverän] steht außerhalb der normal geltenden Rechtsordnung und gehört doch zu ihr, denn *er ist zuständig für die Entscheidung, ob die Verfassung in toto suspendiert werden kann."* (Schmitt, 1934, S. 13) Weder die Existenz des Ausnahmezustands noch die Entscheidung über die Notwendigkeit seiner Einführung ist allerdings ein rechtliches, sondern vielmehr ein politisches Problem. *„Souverän ist, wer über den Ausnahmezustand entscheidet"* – lautet die aus der Souveränitätslehre hervorgehende, belehrende Definition im ersten Satz von Schmitts Studie (Schmitt, 1934, S. 11). Schmitt verweist bezüglich der Entscheidung über den Ausnahmezustand zurecht darauf hin, dass der Beschluss nicht aus dem Inhalt der Norm hervorgeht, da die Norm (also die Verfassung) den Souverän nur zum Vollzug dieser rein machtpolitischen Entscheidung ermächtigt. Auf diese Weise wird bei der inhaltlichen

[1] Zur umfassenden Darstellung dieser Zeitphase siehe Heinrich August Winkler, Weimar 1918-1933. Die Geschichte der ersten deutschen Demokratie, München 1993; Gyula Tokody/ Emil Niederhauser, Németország története [Die Geschichte Deutschlands], Budapest 1972.

Frage, also bei der Frage der tatsächlichen Einführung des Ausnahmezustands, die Entscheidung klar von der Rechtsnorm getrennt. Und in verallgemeinerter Form radikalisierte er die Bedeutung der Entscheidung weiter, indem er sie vom Prinzip des Exzeptionellen loslöste. *„Denn jede Ordnung beruht auf einer Entscheidung und auch der Begriff der Rechtsordnung, der gedankenlos als etwas Selbstverständliches angewandt wird, enthält den Gegensatz der zwei verschiedenen Elemente des Juristischen in sich. Auch die Rechtsordnung, wie jede Ordnung, beruht auf einer Entscheidung, und nicht auf einer Norm."* (Schmitt, 1934, S. 16)

Wir können Schmitts Argumentation insofern zustimmen, als bei diesem Problem der Grenzwert klar ausgemacht werden kann, wo das Recht sozusagen aus sich selbst herausschlüpft und als seine eigene Voraussetzung jene politische Macht aufzeigt, deren rechtsschöpfende und rechtspflegerische Ordnung es ist. Es kann nicht auf eine hypothetische „Grundnorm" zurückgeführt werden, wie bei Kelsen, sondern nur auf ein handelndes Subjekt, das entscheidet, d.h. das die Rechtsordnung einführt. Eigentlich müssten wir Schmitts Argumentation nur um den Aspekt der revolutionären Situationen, der Bürgerkriege und der gesellschaftlich-politischen Kämpfe zur Ergreifung der legislativen Macht erweitern, um den Moment der Entscheidung, die die Rechtsordnung konstituiert, rechtstheoretisch zu konkretisieren, denn diese Situationen sind in der Geschichte kaum als Ausnahmen oder atypische Phänomene zu betrachten (was Schmitt auch nicht behauptet)[2]. Vom rechtlichen Gesichtspunkt hingegen kann Schmitts Argumentation weiter untersucht werden, wenn wir den Ausnahmezustand mit der Situation der sozialen Revolution bzw. Konterrevolution

[2] Schmitts Theorie tritt an dem Punkt – wo er die anderenorts als Bürgerkrieg betrachtete Situation analysiert – objektiv in Verbindung mit dem Verständnis vom Feind in Begriff des Politischen. Bezüglich dieses Feindverständnisses erhalten wir nicht nur eine theoretische Konstruktion, sondern Schmitt charakterisiert auch seine entscheidenden Formen: der reguläre Soldat, der Guerilla, der Partisane und der Revolutionär. Auf diese sachliche Verbindung hat zuerst vermutlich György Lukács in seinem 1954 erschienenen Buch verwiesen: „Trotz aller existenzialphilosophischer Verschleierung, trotz der ununterbrochenen Kokettierung mit dem »Leben« und mit der historischen Konkretheit verbirgt sich – als positiver Kern der Rechtssoziologie Schmitts – ein sehr mageres Schema hinter all dieser Polemik: die Reduktion jeder politischen und deshalb rechtlichen und staatlichen Beziehung auf ein Freund-Feind-Schema." (Lukács, 1978, S. 589) Wir müssen hier natürlich kritisch hinzufügen, dass das Schema von Schmitt in erster Linie eine theoretische Durchleuchtung der Politik als spezifische Form des Handelns darstellt – wenn auch ohne gesellschaftstheoretische Fundierung. Insofern ist es „mager", andererseits verfügt dieses Schema über eine sehr starke Erklärungskraft. Von den beiden Richtungen, die im Zuge des Zerfalls der Hegel'schen Philosophie entstanden sind, dem Marxismus und dem Existentialismus, setzte Lukács selbstverständlich ersteren fort, Schmitt letzteren. Wir werden noch dazu kommen, Schmitts Hegelianismus vorzustellen und auch die Frage zu erörtern, wo sich Schmitt bei der Darlegung der sachlichen Probleme in Richtung einer existentialphilosophischen Fundierung orientiert.

vergleichen. Soziale Revolutionen sind gesellschaftliche Fakten, Menschen, politische Strömungen und Institutionen mit elementarer Kraft mit sich reißende und neue schaffende Stürme, die hinsichtlich ihrer rechtlichen Wirkungen als rechtliche Fakten mit dem Charakter einer höheren Gewalt (*vis maior*) zu bewerten sind. Anders verhält es sich bei Ausnahmezuständen, denn bei diesen hat das *formale rechtliche Element formale, aber berechenbare Auswirkungen auf die Lebensführung des Individuums*. Diese Tatsache hat Schmitt nicht oder nicht hinreichend berücksichtigt, als er die Berechenbarkeit, die unter den – auf den Spuren Webers – analysierten drei verschiedenen Bedeutungszusammenhänge der *rechtlichen Form* erwähnt wird, nicht mit dem I. Kapitel, d.h. mit dem Thema der Definition der Souveränität, verband (Schmitt, 1934, S. 14). Wenn der Ausnahmezustand verhängt wird und die damit verbundenen Maßnahmen bekannt gemacht werden, dann kann der Staatsbürger damit rechnen, dass er im Falle der Nichtbeachtung der Ausgangssperre vor ein Standgericht gestellt wird und für die Verletzung des Versammlungsverbotes erschossen wird. Der Ausnahmezustand kann dem formellen Rationalismus des Rechtsstaates entsprechen, und im konkreten Fall ist es keineswegs egal, wenn – zum Beispiel – ein Mensch dadurch sein Leben retten kann. (Die Standhaftigkeit eines Revolutionärs wird dieser Umstand natürlich kaum erschüttern.) Die Maßnahmen verletzen natürlich in zahlreichen Fällen die Freiheitsrechte der materiellen Rechtsstaatlichkeit und die grundlegenden staatsbürgerlichen Rechte, sie haben aber dennoch keine *vis maior* Rechtswirkung wie die sozialen Revolutionen. Die Verdeutlichung dieses Unterschiedes diente uns nur dazu, den Gesichtspunkt der *formalen Legalität* vorzustellen, und zu nichts anderem. Die formale Legalität hat, unabhängig von jeglichem Inhalt, eine über das Recht hinausweisende gesellschaftliche Wirkung, die lediglich vom Standpunkt des Rechtsnihilismus irrelevant ist. Diese Wirkung hätte die dezisionistische Argumentation aber nicht außer Acht lassen dürfen.

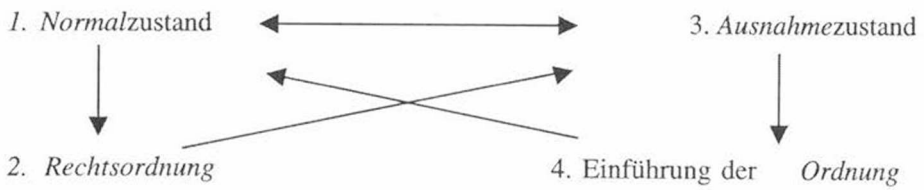
Wir können also feststellen, dass die Phänomene des Ausnahmezustandes und der revolutionären Situation – unter Berücksichtigung der obigen, sich auf den formalen Rationalismus des Ausnahmezustands beziehenden Einschränkung – aus dem Wirkungsbereich des Vorranges des Rechts herausfallen und das Primat der – über das Recht hinausgehenden – sozialen und politischen Faktoren gegenüber dem Recht beweisen. Wenn wir diejenigen Bereiche und Situationen darlegen, in denen die Kriterien der Rechtsstaatlichkeit nicht zur Geltung kommen, dann grenzen wir auch ein, wo diese Kriterien tatsächlich Gültigkeit haben können. Die Ausnahme bestätigt die Regel, weil sie den Gültigkeitsbereich der Regel zeigt. Insbesondere weißt sie darauf hin, dass Rechtsstaatlichkeit in stationären gesellschaftlich-politischen Zuständen existieren kann, während sie in revolutionären Situationen und bei Ausnahmezuständen ausgeschlossen ist. Die radikal rechtsstaatskritische Position von Schmitt ist zur Ein-

grenzung des Problembereichs des Rechts mit rechtsstaatlicher Qualität unverzichtbar. Schmitts glänzende theoretische Argumentation entwickelt sich methodisch dort *zu einer falschen, übermäßigen Verallgemeinerung, wo er die sich auf die Ausnahme beziehende Argumentation zur allgemeinen Aufhebung der Rechtsstaatlichkeit als Normalform verwendet*, insbesondere in seinen späteren Arbeiten (siehe Schmitt 1928; 1932). Aus der Tatsache nämlich, dass die Ausnahme wichtiger sein kann, als die Regel, und die Eingrenzung des Gültigkeitsbereiches der Regel die Kenntnis der Ausnahmen voraussetzt – so wie auch die Ausnahme nur in Bezug auf die Regel über Bedeutung und Bedeutsamkeit verfügt –, kann noch nicht gefolgert werden, dass die Normalform fällt[3]. In Anknüpfung an Franz Naumann haben wir gezeigt, dass die Gültigkeit der Rechtsstaatlichkeit theoretisch aufrecht erhalten werden kann, wenn wir mit einem Rechtsbegriff arbeiten, der auf einer begrenzten Souveränität beruht. Hier ist das Recht nicht bloße *voluntas*, in normative Form gebrachter Wille des Staates, sondern entspricht dem Erfordernis irgendeiner *ratio*, die auch für den Souverän bindend ist (Szigeti/ Takács 1998, S. 188 f.). Mit der Theorie von Schmitt und mit der absoluten Souveränität ist dies zugleich unvereinbar, denn bei Schmitt bindet das Recht den Souverän nicht. Bei der Entwicklung seines Standpunktes spielten nicht etwa irgendwelche Defizite in seinen theoretischen Fähigkeiten die Hauptrolle, sondern seine konservativ-etatistischen Motivationen. Verglichen mit dem Normalzustand verbirgt sich das Spezifikum des Ausnahmezustands gerade darin, dass letzterer die Rechtsordnung des Normalzustandes suspendiert. Zugleich ist der Ausnahmezustand aber kein Zustand der Anarchie, sondern eine reale Ordnung *ohne* Rechtsordnung, deren Ziel es ist, den ursprünglichen verfassungsmäßigen Zustand wiederherzustellen. Das ist das theoretische Konstrukt der *Politischen Theologie*, das auch Sándor Pethő in seiner Monographie über Carl Schmitt ähnlich beurteilt (Pethő, 1993, S. 137-143). In seinen späteren Werken kritisiert Schmitt auch deshalb den parlamentarischen Rechtsstaat und *in concreto* die Weimarer Demokratie, weil dieser bzw. diese infolge des Auseinanderdriftens der pluralistischen Kräfte nicht in der Lage war, die *politische Einheit* herzustellen, *die die Grundlage des staatlichen Lebens bildet*. Damals, in den zwanziger Jahren, richteten sich die theoretischen Bemühungen Schmitts noch auf den Schutz der Verfassung und der Ausnahmefall der Diktatur erhält bei Schmitt dadurch eine etatistische

[3] Dies soll mit einem Beispiel aus dem Recht untermauert werden: die Normalform der Pflicht zur Entschädigung („Wer einem anderen unrechtmäßig Schaden zufügt, der ist verpflichtet, dafür aufzukommen") wird nicht dadurch überflüssig, dass sich spezielle Ausnahmen davon herausgebildet haben – beispielweise die Form der vom Verschulden unabhängigen objektiven Verantwortung oder die speziellen Regelungen hinsichtlich der Entschädigung innerhalb eines Arbeitsverhältnisses. Damit wird insgesamt nur die Anwendung der Normalform eingeschränkt, weil sich der Bereich ihrer Bedeutung und Anwendung – gerade durch die Bestimmung der eigenen Ausnahmefälle – genauer abzeichnet.

Bestätigung, dass er die Diktatur als Mittel zur Wiedererrichtung des Staates und der Verfassungsmäßigkeit interpretiert. Betrachten wir nun näher, mit Blick auf seine kategoriale Struktur, wie er dies tut. *„Die Existenz des Staates bewährt hier* [d.h. im Falle des Ausnahmezustands, P. Sz.*] eine zweifellose Überlegenheit über die Geltung der Rechtsnorm. Die Entscheidung macht sich frei von jeder normativen Gebundenheit und wird im eigentlichen Sinne absolut. Im Ausnahmefall suspendiert der Staat das Recht, kraft eines Selbsterhaltungsrechtes, wie man sagt. Die zwei Elemente des Begriffs der »Rechts-Ordnung« treten hier einander gegenüber und beweisen ihre begriffliche Selbständigkeit. So wie im Normalfall das selbständige Moment der Entscheidung auf ein Minimum zurückgedrängt werden kann, wird im Ausnahmefall die Norm vernichtet. Trotzdem bleibt auch der Ausnahmefall der juristischen Erkenntnis zugänglich, weil beide Elemente, die Norm wie die Entscheidung, im Rahmen des Juristischen verbleiben. Es wäre eine rohe Übertragung der schematischen Disjunktion von Soziologie und Rechtslehre, wenn man sagen wollte, die Ausnahme habe keine juristische Bedeutung und sei infolgedessen »Soziologie«. Die Ausnahme ist das nicht Subsumierbare; sie entzieht sich der generellen Fassung, aber gleichzeitig offenbart sie ein spezifisch-juristisches Formelement, die Dezision, in absoluter Reinheit. In seiner absoluten Gestalt ist der Ausnahmefall dann eingetreten, wenn erst die Situation geschaffen werden muß, in der Rechtssätze gelten können. Jede generelle Norm verlangt eine normale Gestaltung der Lebensverhältnisse, auch welche sie tatbestandsmäßig Anwendung finden soll und die sie ihrer normativen Regelung unterwirft. Die Norm braucht ein homogenes Medium."* (Schmitt, 1934, S. 19.)

Wir können uns die normative Ordnung des Normalzustandes und die nichtnormative Ordnung des Ausnahmezustandes anhand der folgenden Abbildung vergegenwärtigen:



(Entscheidungsautonomie auf dem Minimum) (Entscheidung des Souveräns, die nicht auf der Norm, sondern auf der Autorität beruht)

Der Normalzustand (1) und der Ausnahmezustand (3) sind zwei qualitativ unterschiedliche Situationen, die einander scharf gegenüberstehen. Im Normalzustand gibt es eine Rechtsordnung (2), die mittels Entscheidungen, die auf der

Norm basieren, als Rechtsordnung konkretisiert wird. Der zerrüttete Normalzustand und die Leugnung seiner Rechtsordnung führen zum Ausnahmezustand (3), in dem es keine konkreten Rechtsverhältnisse und keine konkrete Rechtsordnung mehr gibt, die aus der Verfassung abgeleitet werden können. Nur der Souverän hat eine auf seiner Autorität gründende Bevollmächtigung, über diesen Zustand zu entscheiden. Die Entscheidung über den Ausnahmezustand und über seine Einführung, sowie die normativen und individuellen Verfügungen und realen Handlungen im Ausnahmezustand sind gleichermaßen konstitutive Akte des Souveräns, die prinzipiell das Ziel verfolgen, die Rückkehr zu Ordnung (4) zu gewährleisten. Der Ausnahmezustand ist zum einen keine anarchische Situation, keine Herrschaftslosigkeit, sondern eine exzeptionelle Situation, die durch die *potestas* der Autorität beherrscht wird, zum anderen stellt er aber auch kein Chaos dar, in dem man durch die Kräfte der Auflösung in Richtung einer neuen Ordnung gelangen könnte – in diesem Falle müsste man einen Antagonismus und kein gegensätzliches Verhältnis voraussetzen –, sondern die *Rückkehr zur Rechtsordnung des Normalzustands* (1). Schmitts Lösung in seiner *Politischen Theologie* ist deshalb eine konservative, etatistische politische Philosophie, weil es gerade das Ziel und der immanente Sinn des Exzeptionellen ist, dass aus den Kräften des Zerfalls keine neue Ordnung entsteht, sondern dass es – durch die Verhinderung einer neuen Ordnung – zur *Rückkehr zur alten Ordnung* kommt. *In concreto*: anstelle der sozialistischen Revolution sollte es – am damaligen Ort und zur damaligen Zeit, d.h. vor 1923 – zur Rückkehr zum bürgerlichen Weimarer Staat kommen. Das äußere, indifferente Verhältnis des Unterschieds wird durch das gegensätzliche Verhältnis abgelöst, wobei beim gegensätzlichen Verhältnis noch – auf Umwegen, mittels der Einführung des Ausnahmezustandes und seiner Ordnung (4) – vermittelt werden kann.

Schmitt sagt nicht (aber wir können in Kenntnis der Hegel'schen und Marx'schen Dialektik und unter ihrer Anwendung darauf hinweisen), dass – abweichend von den revolutionären bzw. gegenrevolutionären Situationen, in denen der Gegensatz nicht (mehr) mittels Vermittlung überwunden werden kann, weil in der prozeßgemäßen Auflösung der Ereignisse die kategorielle Struktur in den Widerspruch, noch dazu in einen antagonistischen Widerspruch, übergeht – im Ausnahmezustand die Vermittlung der formalen Rechtmäßigkeit noch Bedeutung hat und es zählt, dass die Unterscheidung von Freund und Feind hier – bezüglich des Intensitätsgrades – nicht bis zur totalen Vernichtung des totalen Feindes geht. Es reicht aus, den Gegner bzw. Feind in den „politischen Hundestall" des Ausnahmezustands zu sperren und die politischen Kräfteverhältnisse mittels eines Systems des Ausnahmerechts umzuformen. Wenn sich die Widersprüche verschärfen, dann sieht die Situation anders aus: sie entwickelt sich zum Antagonismus, der ein ausgesprochen unversöhn-

liches und unauflösbares gegensätzliches Verhältnis, bei dem keine Vermittlung mehr stattfinden kann, darstellt. Hier kommt die Möglichkeit zur Vermittlung zu Fall. Kategorisch, als Existenzbestimmungen gesehen, bedeutet das, dass aufgrund des Fehlens der Vermittlung die Weiterexistenz des einen politischen Pols nicht ohne die Vernichtung des anderen Pols möglich ist – und umgekehrt. Nun verändern entweder die revolutionären oder die konterrevolutionären Kräfte die Totalität des gesellschaftlichen Lebens. Und diese verschärfte Form *des Politischen* kann mit dem Beschluss zur Einführung des Ausnahmezustands (und mit den daraufhin in Kraft tretenden konkreten Verfügungen) keine Form der Bewegung mehr finden. Wenn es mittels der neutralisierenden, entwaffnenden Anwendung des Rechts noch zu einer Vermittlung zwischen den Gegensätzen kommen kann, so ist dies das Exzeptionelle. Wenn der Unterschied zwischen den verschiedenen politischen Qualitäten – obwohl sie einander gegenüber nicht indifferent sind, weil sie miteinander konkurrieren – nicht einen „solchen Intensitätsgrad des Gegensatzes" erreicht, der die Entscheidung des Souveräns erfordern würde, dann ist eigentlich – als schwache Grenzsituation – auch aufgrund der Schmitt'schen Theorie die Situation des „geregelten Wettbewerbs" der pluralistischen Demokratie zu erkennen. Der Ausnahmezustand ist so – verglichen mit der revolutionären bzw. konterrevolutionären (Bürgerkriegs-) Situation – die dritte Modalität. Diese lässt sich allerdings eher erst nachträglich, infolge der politikgeschichtlichen Erfahrungen nach dem Zweiten Weltkrieg, in die Theorie Schmitts hineininterpretieren, und es ist kaum ein Zufall, dass Schmitt dies damals nicht tat. Diese Lösung aber paßt auch in die Konstruktion des *Begriffs des Politischen* von 1932 hinein, neben einer erzwungenen und ausgeweiteten Interpretation – dabei wird außer Acht gelassen, dass gerade die enge und nicht die erweiterte Interpretation die sozialen Kämpfe und politischen Prozesse im Deutschland der Zwischenkriegszeit theoretisch angemessen zum Ausdruck bringt.

Wenn wir jetzt unsere bisherigen Analysen gedanklich *mit dem Begriff des Politischen verbinden, dann stehen wir drei Situationen mit unterschiedlichen Konsequenzen gegenüber, je nachdem, wie wir den Intensitätsgrad der Unterscheidung von Freund und Feind interpretieren. Demgemäß ergeben sich analytisch die folgenden Möglichkeiten:*

1) Das gegensätzliche Verhältnis mit einer Unterscheidung von Freund und Feind; hier kann es nur mittels der *außerordentlichen Rechtsordnung* des Ausnahmezustands zu einer Vermittlung kommen; in dieser Situation kann noch eine Lösung gefunden werden.

2) Die unvermittelbare Situation des Gegensatzes als Antagonismus; hier kann der eine Pol nur durch die Vernichtung des anderen überleben. Infolge einer solchen Situation kommt es oftmals zum Phänomen der *illegitimen Rechtsschöpfung*.

3) Die Existenz eines gegensätzlichen Verhältnisses, bei dem die Unterschiede gegenseitig nicht indifferent bleiben bzw. die Seiten und Pole miteinander rivalisieren und es auch ohne die Entscheidung des Souveräns zu einer Vermittlung kommen kann, weil aufgrund der geregelten Wettbewerbssituation eine politische Bewegungsform existiert. In einer solchen politischen Situation hat die Rechtsordnung der Normalform Gültigkeit.

Halten wir also fest: den Unterschied der kategorialen Struktur von 1) und 2) hat Schmitt nicht wirklich erkannt, denn er hat die Möglichkeit 2) nicht ausgearbeitet. In dem von ihm verwendeten Terminus „Intensitätsgrad" verschwindet nämlich der *Unterschied der kategoriellen Konstruktion* von Gleichheit, Unterschied, Gegensatz, Widerspruch und antagonistischem Widerspruch.

Zwar spürte Schmitt den Unterschied von 1) und 3), aber bei ihm wird das Politische als Intensität der Unterscheidung vom Antagonismus her interpretiert, ohne dass er den Ausnahmezustand, seine formale und berechenbare Rechtmäßigkeit – sachlich – dem revolutionären bzw. Bürgerkriegszustand gegenübergestellt hätte (und die Unrichtigkeit der schematischen Trennung der rechtswissenschaftlichen und soziologischen Momente in Betracht gezogen hätte.)

Die Frage des Politischen als Kraft, die über eine gesamtgesellschaftliche Ebene verfügt, hat Schmitt nicht nur bei der Beurteilung der letztendlichen Frage des Ausnahmezustands beschäftigt, sondern auch als staatsrechtliche Lehre von der neutralen Macht. Die Problemstellung seiner Arbeit *Der Hüter der Verfassung* (1931) war, dass man die Meinungsverschiedenheiten zwischen den an den politischen Kämpfen beteiligten Seiten, wenn sie keine unmittelbare Verletzung der Verfassung herbeiführen, nicht auf dem Wege der Justiz bzw. ihres Formenzwanges entscheiden kann. Diese werden *„entweder durch eine über den differierenden Meinungen stehende, stärkere politische Macht von oben, also durch einen höheren Dritten beseitigt – das wäre dann aber nicht der Hüter der Verfassung, sondern der souveräne Herr des Staates; oder sie werden vermittels einer nicht über-, sondern nebengeordneten Stelle beigelegt oder ausgetragen, also durch einen neutralen Dritten – das ist der Sinn einer neutralen Gewalt, eines pouvoir neutre et intermédiaire, der nicht über, sondern neben den andern verfassungsmäßigen Gewalten steht, aber mit eigenartigen Befugnissen und Einwirkungsmöglichkeiten ausgestattet ist. Soll nicht eine bloß akzessorische Nebenwirkung anderer staatlicher Tätigkeiten eintreten, sondern eine besondere Einrichtung und Instanz organisiert werden, deren Aufgabe es ist, das verfassungsmäßige Funktionieren der verschiedenen Gewalten zu sichern und die Verfassung zu waren, so ist es in einem Gewaltenunterscheidenden Rechtstaat folgerichtig, keine der vorhandenen* [im Sinne von traditionellen, P. Sz.] *Gewalten nebenbei damit zu betrauen, weil sie sonst nur ein Übergewicht gegenüber den andern erhielte und sich selbst der Kon-*

trolle entziehen könnte. Sie würde dadurch zum Herrn der Verfassung. Es ist daher notwendig, eine besondere neutrale Gewalt neben die andern Gewalten zu stellen und durch spezifische Befugnisse mit ihnen zu verbinden und auszubalancieren." (Schmitt, 1931, S. 132.).

Die – auf Benjamin Constant zurückgehende – *pouvoir neutre et intermédiaire et régulateur* des Staatsoberhauptes hätte Schmitt mit denjenigen verfassungsrechtlichen Katalogen ausgestattet, die es bei den Monarchen oder Staatspräsidenten im 19. Jahrhundert gab (Immunität, Sanktionierung und Verkündung der Gesetze, Begnadigungsrecht, Ernennung der Minister und höheren Beamten, Recht zur Auflösung der gewählten Kammer). Diese für die neutrale Macht vorbehaltenen Kompetenzen und Vorrechte zur Intervention müssen im Verfassungsstaat noch um etwas ergänzt werden, was im Nachleben des Werks des Vaters des französischen Liberalismus Constant – „der das französische Bürgertum zum Parlamentarismus erzogen hat" – unbeachtet blieb: um die Notwendigkeit der Schutz- und Bewahrungsmacht, der *pouvoir préservateur* des Staatsoberhauptes.

Wie begründet Schmitt diese Macht des Staatsoberhauptes und gegen wen und was schützt sie die Gesellschaft? Schmitt wendet hier – als seine eigene Erfindung – eine charakteristische Technik der Trennung an: er führt die Begriffe der *auctoritas* und der *potestas* ein. Durch die Unterscheidung dieser Begriffe wird die besondere Situation verständlich, in der das Staatsoberhaupt herrscht, aber nicht regiert. *„Der praktische Wert der Lehre von der neutralen, vermittelnden, regulierenden und wahrenden Stellung des Staatshauptes liegt zunächst darin, daß nunmehr die Frage beantwortet werden kann, was denn in einem bürgerlichen Rechtstaat, sei er konstitutionelle Monarchie oder konstitutionelle Demokratie, das Staatshaupt noch bedeutet und was der Sinn seiner Befugnisse ist, wenn die Gesetzgebung ganz bei den Kammern liegt, die vom Staatshaupt ernannten Minister ganz vom Vertrauen der gesetzgebenden Körperschaften abhängig sind, das Staatshaupt selbst in allem an die Gegenzeichnung der Minister gebunden ist und man infolgedessen vom ihm sagen kann: il règne* et ne gouverne pas." (Schmitt, 1931, S. 135.) Das ist die Situation, die die Deutschen deshalb nicht verstehen, weil ihrer Meinung nach der Herrscher immer auch tatsächlich herrschen und über eine wirkliche Regierung verfügen muß (Max von Seydel), denn wenn man ihm das Recht zum Regieren entzieht, dann bliebe überhaupt nichts von seiner Herrschaft. Nach Meinung Schmitts bleibt aber dennoch etwas, nämlich *„...daß das Staatshaupt in einer solchen Verfassung über die ihm zugewiesenen Zuständigkeiten hinaus die Kontinuität und Permanenz der staatlichen Einheit und ihres einheitlichen Funktionierens darstellt, und daß es aus Gründen der Kontinuität, des moralischen Ansehens und allgemeinem Vertrauens eine besondere Art von Autorität haben muß, die ebensogut zum Leben jedes Staates gehört wie die täglich aktiv werdende*

Macht und Befehlsgewalt. Für die Lehre von der neutralen Gewalt ist das von besonderem Interesse, weil die eigenartige Funktion des neutralen Dritten nicht in fortwährender, kommandierender und reglementierender Aktivität besteht, sondern zunächst nur vermittelnd, wahrend und regulierend, und nur im Notfall aktiv ist;..." (Schmitt, 1931, S. 136 f.; Hervorhebung durch P. Sz.)

Die *formale Macht*, die *auctoritas* ist nur im Notstand und nur im letzten, eschatologischen Sinne eine aktive Tätigkeit. Und im Normalfall nimmt das neutrale Staatsoberhaupt keine solche schützende Aktivität wahr. Insofern gründet Schmitt die Begründetheit der Existenz der *pouvoir préservateur* auf die Diskrepanz der Normalform und des Exzeptionellen. Das Staatsoberhaupt verfügt aber nicht nur in formellem, sondern auch im informellen Sinne über Autorität und kann *potestas* entfalten. Und seine besondere Situation kann auf die Einheit dieser zwei Momente gegründet werden. *„Die meisten bedeutenden Staatshäupter des 19. und 20. Jahrhunderts haben es verstanden, hinter ihren Ministern zurückzutreten, ohne dadurch an Autorität zu verlieren. Ein Verfassungsgesetz kann freilich die persönlichen Eigenschaften, die erforderlich sind, um die Rolle des pouvoir neutre vollkommen zu erfüllen, nicht vorschreiben und erzwingen, ebensowenig wie es etwa vorschreiben kann, daß der Reichskanzler ein großer politischer Führer ist und selber die Richtlinien der Politik bestimmt.*" (Schmitt, 1931, S. 137.) Es ist also erkennbar, dass das, was ein Verfassungsgesetz nicht vorschreiben kann, aber *durch die informelle Macht der persönlichen Qualitäten entstehen kann*, die Rolle der *pouvoir neutre* ausweiten wird. Es ist hier nicht notwendig, mit der Geschichte der Weimarer Verfassung fortzufahren – also mit der starken Legitimation des durch das Volk gewählten Präsidenten, mit der Positionierung des Verfassungsartikels 48 und der präsidiellen Macht, die die Rolle eines festen und ruhenden Pols der Verfassung einnimmt und die den pluralistischen Staat der Parteienkoalitionen als ein Ganzes im Auge hat[4]. Schmitt argumentiert ganz im Zeichen seiner dezisionistischen Methodik mit ungelösten und unlösbaren Angelegenheiten. So äußert er hinsichtlich des Konflikts zwischen dem Präsidenten des Reichsgerichts Simons und der Regierung vom Dezember 1928, dass der Präsident des Reichsgerichts formal – also seitens des positiven Rechts, sagen wir aus dem Blickwinkel eines Grundbuchrichters gesehen – kein Recht habe, sich an den Staatspräsidenten zu wenden, weil dies nicht der Verfassung entspreche. Diese räume nämlich dem Staatspräsidenten keine Kompetenzen zur Entscheidung dieses Konflikts ein. *„Wenn der Reichspräsident statt dessen in seiner*

[4] Schmitt zitiert hier Franz Naumann: „Das für die Reichstagswahl geltende Proportionalwahlrecht und die daraus sich ergebende Vielheit der Parteien führen dazu, daß der Reichskanzler Koalitionsminister sein wird. Gerade aus diesem Grunde wird sich das Bedürfnis nach einer Persönlichkeit, die das Ganze im Auge hat, besonders stark geltend machen."(Schmitt 1931, S. 138.)

Antwort, neben der Erklärung, daß er sich »zu einer formellen Entscheidung über die Beschwerde aus verfassungsrechtlichen Gründen nicht für zuständig erachte«, doch auch in der Sache Stellung nimmt und der Reichsregierung recht gibt, zugleich aber dann dem Reichsgerichtspräsident in einer persönlich entgegenkommenden Weise antwortet, so entspricht das einer richtigen Auffassung von der neutralen, vermittelnden, regulierenden und wahrenden Stellung des Staatshauptes und ist aus dieser Lehre heraus zu verstehen und zu rechtfertigen. Damit entfällt auch die Kritik die daran geübt worden ist, daß der Reichspräsident gelegentlich durch persönliche Briefe, die nicht vom Reichskanzler gegengezeichnet sind, und andere Äußerungen auf den Gang von Verhandlungen Einfluß genommen hat." (Schmitt, 1931, S. 139 f.)

Mit der Vorstellung der informellen Macht der *pouvoir neutre* sind wir – methodisch gesehen – an dem Punkt angelangt, wo sich Makro- und Mikroebene als gemeinsame gedankliche Grundlage des Dezisionismus berühren bzw. wo sie zusammentreffen: das Subjekt der Entscheidung erhält – mittels seiner persönlichen Qualitäten, seiner informellen *potestas* – eine selbständige Bedeutung gegenüber der formal-rechtlichen, normativen Entscheidungsmacht und -autorität. Beide Momente bilden eine Einheit, wie dies Schmitt in Kapitel 26 des Leviatan nachweist, aber es gibt keine Autorität ohne *potestas* (Schmitt, 1934, S. 44.). Der Terminus des „Dezisionismus" stammt von *decisio*, der lateinischen Transkription des Begriffes Krisensituation bzw. Grenzsituation, der wiederum aus dem griechischen Wort *crisis* hervorging. Der entscheidende Standpunkt ist derjenige, der die staats- und politiktheoretischen, verfassungsrechtlichen Themen – die nun nicht mehr auf dem Methodendualismus der soziologischen Sachlichkeit und der rechtswissenschaftlichen Normativität aufbauen, denn der Anspruch der Normativität wird den Entscheidungen, die in einer Grenzsituation gefasst werden, und des Exzeptionellen in ontischem Sinne nicht gerecht – methodisch mit den Problemen der Rechtstheorie, die sich auf die Rechtsanwendung beziehen, vereinigt. Es kommt vor, dass Schmitt bei seinen Ausführungen über die „Soziologie juristischer Begriffe" dementsprechend vorgeht (Schmitt, 1934, S. 50.), ein anderes mal aber schreibt er über die „juristische Wissenschaftlichkeit" (Schmitt, 1934, S. 44.) oder über die Typen der juristischen Wissenschaftlichkeit (Schmitt, 1934, ebenda.), wobei er nicht annähernd die Fragen der *intentio reflecta*, sondern die der *intentio recta* analysiert, also nicht rechtswissenschaftliche, sondern rechtliche Themen.

Das Recht ist – wie bei Austin – die Entscheidung des Souveräns. Und damit können die rechtlichen Entscheidungen auf der Makro- und Makroebene auf gemeinsamer Grundlage analysiert werden[5]. Vergleichen wir den Standpunkt

[5] Es ist ein versteckter Kelsenismus, dass die theoretische Erfindung des Stufenaufbaus der Rechtsordnung – jeder normative Akt ist, gesehen von der höheren Stufe, lediglich eine

von Austin aus dem Jahre 1859, die Position von Schmitt aus der Zeit zwischen den Weltkriegen und diejenige von Hart aus 1961. Nach Austin hat das Recht deshalb Autorität, weil es ein imperatives Gebilde ist, weil es befohlen wird. Nach Hart stellt es nicht deswegen eine Verpflichtung dar, weil es befohlen wird, sondern weil die Regeln – mit oder ohne autoritativer Verpflichtung – den Umständen, den Erwartungen und dem Druck der Gesellschaft entsprechen. Nach Schmitt hat das Recht nicht nur und in erster Linie auch nicht deshalb Autorität, weil es ein imperatives Gebilde darstellt, sondern *weil die geistige Kraft der Entscheidung Ansehen verleiht – jenseits und neben dem formellen Moment der Gerichtsbarkeit.* Bei Austin stellt also der imperative Charakter der Autorität das *übergreifende Moment* dar, bei Hart die soziologische Fundierung der erzwingenden Kraft und bei Schmitt das Verständnis als Fähigkeit, als geistige Kraft. Auf alle Fälle und entgegen dem Verständnis der idealistischen, ethisierenden Vertreter des Naturrechts ist bei der Untersuchung der Legalität das Moment der Autorität kaum zu umgehen, weil ohne ihn auch die *Gültigkeit* des Rechts nicht begründet werden kann. Schmitts Dezisionismus weist in der Einheit der zwei Komponenten der Autorität – der Autorität und der *potestas* – die Gültigkeitsfaktoren auf, die in der Rechtsschöpfung, in der regulativen Funktion des Rechts, sowie in der Rechtsanwendung und in seiner konfliktlösenden Entscheidungsfunktion gleichermaßen zugegen sind. Es ist allerdings keine glückliche Lösung, dass er diese Frage nicht als objektive Eigenschaft einer funktionierenden Rechtsordnung behandelt, sondern in Verbindung mit rechtwissenschaftlichem, juristischem Denken – wo doch auch Rechtsauffassungen, die nicht dezisionistischen Typs sind, den autoritativen Charakter des Rechts anerkennen (Hegel, Marx, Kelsen, die Pragmatisten, die skandinavischen Realisten usw.).

In der *Politischen Theologie* Schmitt'scher Prägung existieren zwei Typen der juristischen Wissenschaftlichkeit, „die man danach bestimmen kann, wie weit ein wissenschaftliches Bewußtsein von der normativen Eigenheit der rechtlichen Entscheidung besteht oder nicht." (Schmitt, 1934, S. 44.) Als Schöpfer der Antithese von Macht und Gerechtigkeit ist Hobbes der klassische Vertreter des dezisionistischen Typus: *Autoritas, non veritas facit legem.* Laut Schmitt ist dies eine radikalere und genauere Definition als die Lösung von F. J. Stahl, der

Rechtsanwendung, von der eigenen Ebene her betrachtet aber eine Schöpfung – beim Kelsen-Gegner Schmitt als Dezisionismus vor unsere Augen tritt: denn sowohl die Rechtsschöpfung als auch die rechtsanwendende Entscheidung stellen einen Befehl des Souveräns dar (d.h. das richterliche Urteil entscheidet individuelle, konkrete Rechtsstreitigkeiten auf souveräne Weise). Dem könnten wir vielleicht nur hinzufügen, dass es eine *noch souveränere Weise* ist, wenn der Richter seine Entscheidung nicht aufgrund des Inhalts der Norm trifft, sondern er eine Entscheidungsgrundlage zur Ausfüllung einer Rechtslücke sucht und einführt. Das ist gerade der Fall des vom Richter geschaffenen Rechts, auch wenn es bei weitem nicht die Allgemeingültigkeit der normativen Handlungen besitzt.

Autorität und Majorität gegenüberstellt (Schmitt denkt dabei offenbar an „Autorität, nicht Majorität"). Schmitt begründet dies folgendermaßen: *„Hobbes hat auch ein entscheidendes Argument vorgebracht, welches den Zusammenhang dieses Dezisionismus mit dem Personalismus enthält und alle Versuche, an die Stelle der konkreten Staatssouveränität eine abstrakt geltende Ordnung zu setzen, ablehnt."* (Schmitt, 1934, S. 44.)"

Unter Rückgriff auf Hobbes bestreitet Schmitt, dass es eine geistige Ordnung oder Kraft gibt, die objektiv, unabhängig von einer Person – als „Zurechnungspunkt" – in Betracht gezogen werden kann. Damit negiert er die auf Aristoteles zurückgehende Tradition bzw. den formalen Sinn der Gesetzmäßigkeit. Gemäß dieser Auffassung darf nicht eine Person, sondern muss das Gesetz als unpersönliche Ordnung Herrschaft ausüben („Es herrsche das Gesetz und nicht der Mensch")[6]. Die *potestas* als Komponente der Macht ist personalistisch, weil es „eine juristische Wirklichkeit und Lebendigkeit gibt", die nicht in naturwissenschaftlichem Sinne objektiv ist (Schmitt, 1934, S. 45.). Auch das juristische Denken darf die spezifische Realität, die in der rechtlichen Form der Rechtsnorm begründet ist, nicht außer Acht lassen. *„Die Form, die er sucht, liegt in der konkreten, von einer bestimmten Instanz ausgehenden Entscheidung. Bei der selbständigen Bedeutung der Entscheidung hat das Subjekt der Entscheidung eine selbständige Bedeutung neben ihrem Inhalt. Es kommt für die Wirklichkeit des Rechtslebens darauf an, wer entscheidet. Neben der Frage nach der inhaltlichen Richtigkeit steht die Frage nach der Zuständigkeit. In dem Gegensatz von Subjekt und Inhalt der Entscheidung und in der Eigenbedeutung des Subjekts liegt das Problem der juristischen Form. Sie hat nicht die apriorische Leerheit der transzendentalen Form; denn sie entsteht gerade aus dem juristisch Konkreten. Sie ist auch nicht die Form der technischen Präzision; denn diese hat ein wesentlich sachliches, unpersönliches Zweckinteresse. Sie ist endlich auch nicht die Form der ästhetischen Gestaltung, die eine Dezision nicht kennt." (Schmitt, 1934, S. 46.)*

Welche Argumente findet die Theorie von Carl Schmitt hinsichtlich seines als „Gordischer Knoten" angesehenen Axioms, das lautet folgendermaßen: „Bei der selbständigen Bedeutung der Entscheidung hat das Subjekt der Entscheidung eine selbständige Bedeutung neben ihrem Inhalt." (Schmitt, 1934, S. 46.). Wir können folgendes vorausschicken: wir finden bei Schmitt einen ganzen Komplex von richtigen und falschen Argumenten.

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[6] Wenn wir das Verhältnis von objektivem, unpersönlichem Gesetz und herrschender Persönlichkeit so festmachen, dass ersteres einen negativen, letzteres hingegen einen positiven Wert hat, dann können wir Schmitt Recht geben. Warum auch sollte ein tyrannisches Gesetzwesen besser sein, als die Ordnung eines aufgeklärten Herrschers. Wenn wir jedoch ein gutes Gesetz und einen guten Herrscher bzw. ein schlechtes Gesetz und einen schlechten Herrscher voraussetzen, dann ist wohl das Postulat von Aristoteles richtig, weil in diesem Fall die Gesetzesordnung noch immer berechenbarer ist, als die Macht eines Herrschers, da die Anpassung an eine Person problematischer ist, als diejenige an eine Rechtsordnung.

Die selbständige Bedeutung des Subjekts besteht darin, dass es *Ausnahmezustände* gibt, die *nicht der Normativität zugeordnet werden können.* Und als solche kann ihre Qualität nicht vom Inhalt der Normen abgeleitet werden. Dies formulierte Robert von Mohl folgendermaßen: „Wenn Mohl [...] sagt, die Prüfung, ob ein Notstand vorliegt, könne keine juristische sein, so geht er von der Voraussetzung aus, dass eine Entscheidung im Rechtssinne aus dem Inhalt einer Norm restlos abgeleitet werden muss. " (Mohl zitiert in Schmitt, 1934, S. 11.). Das ist aber nur die Illusion des rechtsstaatlichen Liberalismus und Positivismus, gemäß denen – so können wir hinzufügen – es nicht einmal Rechtslücken gibt und die die Bedeutung der Entscheidung falsch interpretieren. Schmitt hat in seiner *Politischen Theologie* im engeren, sachlichen Wortsinn die Rechtsanwendung nicht rechtstheoretisch und systematisch untersucht. Gleichwohl hat er über ihre Natur vereinzelt anderenorts – nicht immer widerspruchsfreie – Bemerkungen gemacht. Seine Ansichten über die selbständige Bedeutung der Entscheidung können aber eindeutig herausgearbeitet werden und auch sein Standpunkt hinsichtlich der Justiz kann rekonstruiert werden, und zwar folgendermaßen: Die Justiz, die an Normen gebunden ist, macht eine sachliche Einordnung, Subsumierung möglich. Diese Einordnungen sind nach ihrem Inhalt nicht zweifelhaft und unbestritten. „Alle Justiz ist an Normen gebunden und hört auf, wenn die Normen selbst in ihrem Inhalte zweifelhaft und umstritten werden" – lautet eine seiner plastischen Ausführungen in *Hüter der Verfassung* (Schmitt, 1931, S. 19.). Wenn die Sache tatsächlich so wäre, dann könnten wir eigentlich feststellen, dass für Schmitt die Justiz – in der Sprache der heutigen Rechtstheorie ausgedrückt[7] – *immer aus einfachen Fällen besteht* und wir bei den schwierigen Fällen vom Gebiet der Justiz auf das Terrain des Dezisionismus übertreten müßten. Bei einfacheren Fällen, bei denen es nicht um Rechtsfragen geht und die nicht das Problem der rechtlichen Beurteilung betreffen, bedeuten während des Prozesses höchstens die Feststellung des Tatbestandes, die Aufdeckung des Falles und der Nachweis des Falles eine Schwierigkeit. An anderer Stelle macht Schmitt aber auch hinsichtlich dieser einfachen Fälle grundsätzliche, allerdings widersprüchliche Äußerungen: „In jeder Entscheidung, selbst in der eines tatbestandsmäßig subsumierenden prozessentscheidenden Gerichtes liegt ein Element reiner Entscheidung, das nicht aus dem Inhalt der Norm abgeleitet werden kann."[8] (Schmitt, 1931, S. 45 f.)

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[7] Mit rechtlichen Argumentationsweisen und Beweisverfahren, die in schwierigen Fällen nicht aufgrund der Rechtsnormen zu entscheiden sind, die aber mittels anderer Verhaltensmuster (Prinzipien, politische Maßnahmen) beurteilt werden können, befasst sich die eindrucksvolle Arbeit *Taking Rights Seriously* von Ronald Dworkin aus dem Jahre 1977.

[8] Wenn Schmitt darunter verstehen würde, dass bei der Entscheidung – sagen wir bei der Bestimmung des Strafmaßes – individualisierende Zweckmäßigkeit existiert und/oder die Lösung der Spannung von ius strictum und ius aequm immer eine richterliche Abwägung,

Die Einführung des *reinen Entscheidungselements*, das sich nicht aus dem Inhalt der Norm ableitet, stellt also den „springenden Punkt" der Argumentation Schmitts dar. Aber was sollen wir darunter verstehen? Darunter verstanden werden soll die Existenz einer von der Norm unabhängigen Exzeptionalität und Individualität (ganz im Sinne des Sprichworts „am Baum wachsen keine zwei gleichen Blätter"), die das Problem in die Welt der Rechtslücken und schwierigen Fälle hinüberführen würde (auch wenn Schmitt selbst das nicht sagt), oder auch der Sachverhalt, dass auch in den sogenannten einfachen, nicht schwierigen Fällen reine Entscheidungselemente vorhanden sind, die eine Einordnung unter die Norm nicht automatisch erlauben, sondern von der rechtsanwendenden Person eine geistige Kraftanstrengung und intellektuelle Fähigkeiten erfordern. Aus den Texten Schmitts geht allerdings nicht wirklich hervor, ob – unter dem Gesichtspunkt unserer *heutigen* Fragestellung – von der Existenz des *reinen Entscheidungselements*, das die Urteilskraft des Richters im Hinblick auf die Subsumierung erfordert, auch der einfache Fall oder nur die Rechtslücke und der schwierige Fall betroffen ist[9].

Es ist hingegen gewiss, dass bei Schmitt das Exzeptionelle – ohne die von uns eingeführte theoretische Unterscheidung – auch auf der *Mikroebene* Bestand hat, wo es doch eigentlich nur den Sinn der Rechtslücke bekommen müsste. Rechtslücken sind tatsächlich nicht zu eliminieren, bestenfalls mittels vorausschauender Regelung auf ein gewisses Minimum zu reduzieren. Und da es bei der Rechtsanwendung einen Entscheidungszwang gibt – ein Richter kann nicht sagen, er bedauere es, dass er den Rechtsstreit nicht entscheiden könne, da es eine Rechtslücke gebe – verfügt das entscheidende Subjekt bei der Ausfüllung der Rechtslücke, bei der Suche nach einer Entscheidungsgrundlage und bei der Rechtsfindung über Selbständigkeit. Die Tatsache, dass die Ausnahme wichtiger sein kann, als die Regel, unterstreicht Schmitt – wie es einem bedeutenden Denker gebührt – auch philosophisch, indem er Kierkegaard zitiert: *„Die Ausnahme erklärt das Allgemeine und sich selbst. Und wenn man das Allgemeine richtig studieren will, braucht man sich nur nach einer wirklichen Ausnahme umzusehen. Sie legt alles viel deutlicher an den Tag als das Allgemeine selbst. Auf die Länge wird man des ewigen Geredes vom Allgemeinen überdrüssig; es gibt Ausnahmen. Kann man sie nicht erklären, so kann man auch das Allgemeine nicht erklären. Gewöhnlich merkt man die Schwierigkeit nicht, weil man das Allgemeine nicht einmal mit Leidenschaft, sondern mit einer bequemen Oberflächlichkeit denkt. Die Ausnahme dagegen denkt das Allgemeine mit energischer Leidenschaft".* (Kierkegaard zitiert in Schmitt, 1934, S. 22.)

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eine Frage der Urteilskräfte darstellt, dann würde seine Argumentation der Probe der fachlichen Kritik standhalten. Bei ihm wird auf dieses Problem aber nicht eingegangen.

[9] Hierbei handelt es sich um eine Weiterentwicklung der Argumentation, die Schmitt in der *Politischen Theologie* bei der Analyse als Charakteristikum des rechtlichen Denkens gegenüber Hugo Krabbe anwendet: „Omnis interpretacio est *auctoritatis interpositio*".

Es ist also nicht möglich, der faktischen Situation aufgrund der Norm Sinn zu verleihen und ihre Bedeutung zu finden, weil in der – individuellen, einmaligen und nicht wiederholbaren – Ausnahme „die Kraft des wirklichen Lebens die Kruste einer in der Wiederholung erstarrten Mechanik" durchbricht (Schmitt, 1934, S. 22.). Das Exzeptionelle – gemäß seinem anzunehmenden idealtypischen Sinn – verkörpert das Existentielle und die Erneuerung gegenüber dem Regelmäßigen und dem Normalen. Folglich gelangt das reine Entscheidungselement in den Prozeß der Rechtsanwendung. Das den Sinn der Erneuerung in sich tragende Existentielle ist nach Schmitts Auffassung thematisch unreflektiert, *ontisch* – und nicht ontologisch, worauf wir verweisen müssen –, denn nicht das Sein, das aus dem Prozess des Werdens hervorgehende konkrete Existierende ist dasjenige, was reflektiert werden kann. Das reine Entscheidungselement, das das Exzeptionelle fundiert, basiert entweder auf dem existentiellen, individuellen, einmaligen und nicht wiederholbaren Charakter des Exzeptionellen oder aber es steht seine existentielle, begrifflich nicht artikulierte – vermeintliche oder tatsächliche – Natur dahinter. Daher stellt Schmitt fest: *„Der Ausnahmezustand hat für die Jurisprudenz eine analoge Bedeutung wie das Wunder für die Theologie."* (Schmitt, 1934, S. 49.). Mit seinem Verständnis des „Existentiellen", der „geschichtlichen Konkretheit" und der „existentiellen Intellektualität" weicht Schmitt von der Hegel'schen Ontologie ab und bewegt sich in Richtung des Irrealismus der Existenzialphilosophie. Bei Hegel sind die Kategorien – infolge des objektiven Idealismus des Verfassers mit stillschweigendem Logizismus belastete – Existenzbestimmungen. Mit diesen und mit den Modalitätskategorien ist das „Neue" infolge von Variationen und Kombinationen des Alten und/oder durch die Veränderung des Grund-Folge-Verhältnisses abzuleiten[10]. Die Individualität und Exzeptionalität in existenzphilosophischem Sinne – die Träger der Erneuerung sind – sind hingegen nicht ableitbar. Es gibt keinen Grund, als dessen Folge sie sich darstellen würden. Deshalb sind sie formell nicht erfassbar, nicht zu interpretieren – und erfordern die Dezision. Damit schafft Schmitt eigentlich eine Spannung zwischen Normenlogik und Ontizität. Hier können wir bereits feststellen, dass man aufgrund der Norm dem Existenziellen entweder deshalb keinen Sinn geben bzw. zuschreiben kann, weil es unstrukturiert und von unartikulierbarer Natur ist

[10] Wir denken hier daran, wie *Die Wissenschaft der Logik* die modalen Kategorien und das Grund-Folge-Verhältnis behandelt. Zum Teil entsteht der neue, vollständige Grund als Synthese der formalen und des realen Grundes. „Diese durch Grund und Bedingung vermittelte, und durch das Aufheben der Vermittelung mit sich identische Unmittelbarkeit ist die Existenz" (Hegel, 1936, S. 596.) Vom Gesichtspunkt der modalen Kategorien lässt Hegel das Neue von der rein abstrakten Möglichkeit über die Eventualität und sporadische Verwirklichung bis zur realen Möglichkeit und bis zu den sich notwendigerweise entfaltenden Prozessen entstehen (Hegel, 1936, S. 662-696.), als Folge eines selbsttätigen, schöpferischen Grundes.

oder wegen der Natur der konkreten Individualität, die in eine schlechte Unendlichkeit zerfällt. Die Aufgabe der Dezision ist es von der methodischen Seite her also, die Leere auszufüllen, die der *hiatus irracionalis* aufwirft. Der Dezisionismus geht aus der Nichtüberprüfbarkeit der existenzphilosophischen Auffassung des Seinsprozesses und des begriffs- und normenschaffenden Denkens hervor: es handelt sich also um Problemlösungen *nach* der Lokalisierung des normativen Nichts. Der abstrakte Rationalismus Schmitts schlägt deshalb und insofern bei der Aufzeigung des *hiatus irracionalis* in Irrationalismus um, weil er sich nicht folgende Frage stellt: wenn man den Raum mit Dezision ausfüllen muss, wie ist dann die Natur dieser Dezision? Schmitt fasst die reine Entscheidung also als eine letzte Gegebenheit auf, die weder begrifflich noch empirisch weiter analysiert werden kann. Wir hingegen möchten – neben der Einbringung der fachwissenschaftlichen Ebene der Rechtstheorie – auch darauf hinweisen, dass philosophisch-weltanschauliche Motive Schmitt daran gehindert haben, seinen abstrakten Realismus zu überwinden.

All dies bedeutet einen radikalen theoretischen Bruch mit der noch auf neokantianischen Prämissen basierenden, die Rechtspraxis analysierenden Arbeit *Gesetz und Urteil* von Schmitt aus dem Jahre 1912, weil er dort das Recht noch als Einheit von Norm und Entscheidung deutet. In der *Politischen Theologie* und in seinen nachfolgenden Arbeiten, in denen er das Verhältnis von Norm (Rechtsordnung) und Entscheidung (Ordnung) problematisierte, findet diese Einheit ein Ende. Und mit der Trennung der beiden Momente eröffnet sich für den Richter auch Raum, um – über die vorgestellten gesellschaftlichen Zusammenhänge auf der Makroebene hinaus (kategorisierte gesetzgeberische Macht, Bürgerkriegssituation, Ausnahmezustand) – normative, auf dem positiven rechtlichen Nichts basierende Entscheidungen und gerade damit eine politische Dezision zu treffen (wie wir sehen: umfassender, nicht nur im Sinne der Ausfüllung der Rechtslücke). Über das Exzeptionelle hinaus problematisiert Schmitt also auch den Fall der Normalform-Entscheidung – vom Normeninhalt unabhängig – mit dieser speziellen Methodik. Seine Position müssen wir einerseits auf der fachlich-kritischen Ebene, andererseits auf der weltanschaulichen Ebene bewerten. In der Tat kann nicht immer die Norm der Maßstab sein, weil nur in den für die Masse typischen Fällen – sagen wir bei der Normalform – die Einordnung und Subsumierung der lebendigen Sachverhalte unter die Norm eine Lösung sein kann. Auch dann, wenn die Rechtsnorm der Maßstab der Entscheidung ist, ist die Norm eine Abstraktion und Homogenisierung, die sich auf der Ebene von Besonderheit und Charakteristischem bewegen. Deshalb können auch diese Situationen mit einer Argumentation des methodischen Individualismus, die individuelles Konkretes einführt, problematisiert werden. Dessen ungeachtet – und im Gegensatz zu Schmitt – glauben nur wenige in der Rechtstheorie der Rechtsanwendung, dass aufgrund der in der Individualität

zentrifugalen Ebene der existentiellen Konkretheit nicht eine Entscheidung erfolgen könnte, die – infolge der Artikuliertheit des existierenden, des gesellschaftlichen Handelns – aus dem Inhalt der Norm, aus den positiven Rechtssätzen fundiert abgeleitet werden kann. Dies erfolgt nicht mechanisch und automatisch, sondern mit Hilfe der Operationen und Phasen der Rechtsanwendung, sowie mittels der rechtlichen Technik der in der Rechtsauslegung angewandten juristischen Argumentation, weswegen seit Jahrhunderten nur ein Fach, das einen speziellen Zweig in der Arbeitsteilung bildet, die rechtspflegerische Aufgabe ausübt und ausüben kann. Auf der logizistisch-philosophischen Ebene kann man aber immer eine Spannungsverhältnis von deontischer Normenlogik und thematisch nicht reflektiertem Ontizismus erzeugen. Das ist Schmitts Hauptwaffe, die auch wirksam ist. Auf dieser Ebene der Philosophie und in diesem Fall muss man aber von der problemlösenden Fähigkeit der Sachgemäßheit – der konzentrierten Erfahrung und der Gebildetheit – abstrahieren. Diese könnte bei Schmitt implizit, als vermutbarer Inhalt des Begriffs Dezision, sogar vorhanden sein. Darum bemüht er sich allerdings nicht. In der Dezision verschwindet sie gerade deshalb, weil die Normalform nicht die gleiche Natur hat wie die Ausnahmen: sie darf nicht mit der *Rechtslücke*, die objektiv und subjektiv gleichermaßen entsteht und fundierbar ist, und mit den sogenannten *schweren Fällen* vermischt werden. Schmitt brachte diese drei Probleme zu nahe zu einander, ja er behandelte sie sogar zusammen – und dies reicht nicht aus, obgleich die Argumente gegen den Methodendualismus und den Gesetzespositivismus, die das Recht dogmatisch, als logisches Bedeutungsgebilde verstehen, oft überzeugend sind. Sein späteres Aufwerfen der Frage entspricht der Tatsache, dass sich die Problemstellungen von Schmitt, der seine Laufbahn als Rechtsphilosoph begonnen hatte, veränderten und er immer mehr zu einem Verfassungsjuristen und Politologen wurde. Das Verfassungsrecht ist in eminenter Weise ein Gebiet, auf dem das Recht besonderen politischen Charakter trägt: neben seinen normativen und institutionenbildenden Funktionen bleibt seine legitimierende Funktion am allerwenigsten zurück bzw. kann am allerwenigsten zurückbleiben. Wir müssen demzufolge also auch weltanschauliche Postulate darin erblicken, wie die rechtsanwendende Entscheidung hinter ihren juristischen Motiven außerrechtliche Motive in den Vordergrund schiebt. Und sie führt auch dann den Aspekt der politischen (im Vergleich zum Recht existierenden) Autonomie ein, wenn diese irreführend ist und wenn sie sich – beispielsweise – auf das Rechtsgefühl des deutschen Volkes beruft. Aus seinen beiden Studien von 1934 geht klar hervor, warum und wie er dies macht.

In seiner Arbeit *Über die drei Arten des rechtswissenschaftlichen Denkens* will er mit drei, theoretisch gleichwertigen Formen des rechtswissenschaftlichen Denkens jene Probleme und paradoxen Situationen lösen, die wir oben dargelegt haben. Es ist nämlich nicht ausreichend, dass wir *die Ordnung als norma-*

tiven Zustand, die den Typus des Regeln- oder Gesetzdenkens vertritt, von der *konkreten Entscheidung* trennen, die den *Entscheidungsgedanken* repräsentiert, wie wir dies bislang getan haben, sondern es ist auch notwendig, dass eine höhere Einheit die aufgezeigten Schwierigkeiten löst. An dieser Stelle müssen wir aber darauf verweisen, dass die Synthese, die durch *konkretes Ordnungsdenken* zu erreichen ist, rechtstheoretisch das reale Problem zum Ausdruck bringt, dass die *wichtigste Rechtsschicht* der Rechtsordnung *immer* die Ebene *der konkreten Rechtsverhältnisse* darstellt. Es ist dies der Ort, wo die Gerichte, die Behörden oder die privaten Seiten die abstrakten, durch Rechtsnormen vorgeschriebenen Rechtsverhältnisse *mittels der Interpolation rechtlicher Tatsachen* konkretisieren, spezifizieren und individualisieren, um dadurch das Verhalten der Rechtssubjekte als Berechtigte und Verpflichtete mit subjektiven Rechten festzulegen; sie sollen konkrete Rechtsverhältnisse schaffen, modifizieren oder beenden. Der von Schmitt nicht verwendete Begriff beleuchtet klar die sachliche Problemsituation, die durch das konkrete Ordnungsdenken gelöst werden kann – gerade im Gegensatz zur Methodenreinheit von Kelsen, der versucht soziologische, ideologische, politische und moralische Elemente systematisch aus dem Recht auszuschließen. Die Fundierung des konkreten Ordnungsdenkens erfolgt nicht nur mittels der innenpolitischen Bedürfnisse, die die inneren gesellschaftlichen Zustände des Staates zum Ausdruck bringen – wie dies Schmitt in *Legalität und Legitimität* mit der Unterscheidung des gesetzgebenden, rechtspflegenden, regierenden und verwaltenden Staates noch getan hatte (Schmitt, 1932, S. 7–19.)[11]–, sondern er kann seine Ausfassung unter stillschweigender *Entfernung* von den staatlichen und innenpolitischen Tendenzen und *entsprechend seiner weltanschaulichen Wertewahl* auch *verrechtlichen*. Die Wahrhaftigkeit und Gerechtigkeit der konkreten Rechtsverhältnisse vermengt sich an diesem Punkt mit seiner retrograden, falschen Wertewahl. Schmitt untermauert das *konkrete Ordnungsdenken* nämlich gleichermaßen mit der Ordnung der Lebensform, mit dem Rechtsempfinden des Volkes, mit dem System des Gewohnheitsrechts und mit der Großartigkeit des charismatischen Führers. Der Dezisionismus erweist sich an diesem Punkt nicht mehr als methodisch fundiertes Instrument zur Lückenfüllung, sondern vielmehr als verstecktes Naturrecht oder als Rechtspolitik – mit einem für uns nicht besonders anziehenden Inhalt.

[11] Schmitt haben die verschiedenen Stufen und Erscheinungsformen des Rechts bereits früher beschäftigt. So steht dem auf einem geschlossenen Legalitätssystem basierenden gesetzgebenden Staat, unter dem er eine bestimmte Form der politischen Gemeinschaft verstand, ein zweiter, konstruierter Idealtypus (Staatsform) gegenüber (siehe hierzu Schmitt, Legalität und Legitimität, S. 8.)

Bei dieser Begründung spielt eine Rolle, dass die Verfassung immer die politische Entscheidung eines Volkes ist – was, abgesehen von den Fällen der oktroyierten Verfassungsgebung, auch stimmt –, aber auch Schmitts Auffassung, dass die Grundlage des *konkreten Ordnungsdenkens*, also die wichtigste Rechtsebene, weder auf die liberale Vereinigung (auf Konsenstheorien) zurückgeführt werden kann, noch auf die hypothetische Grundnorm (auf den logischen Positivismus Kelsens), noch auf sozioökonomische Gebilde (auf das Gesellschaftsverständnis des marxistischen Sozialismus), *sondern anderer Natur ist*. Zum einen basiert es auf dem Gewohnheitsrecht der Gemeinschaft, zum anderen auf der individuellen Suprematie der deutschen Nation, wenn „der deutsche Staat die Kraft und den Willen hat, Freund und Feind zu unterscheiden" (Schmitt, 1940, S. 203.), oder wenn der Führer „im Augenblick der Gefahr kraft seines Führertums als oberster Richter unmittelbar Recht schafft" und erklärt: „In dieser Stunde war ich verantwortlich für das Schicksal der deutschen Nation und damit des deutschen Volkes obersten Gerichtsherr." Der wahre Führer ist immer auch Richter. Die richterliche Qualität ist eine Konsequenz des Führertums – fügt der Rechtswissenschaftler hinzu (Schmitt, 1940, S. 200.) – wobei er wahrscheinlich an das *konkrete Ordnungsdenken* dachte. Neben dem Pfleger der Rechtstheorie rationalisiert aber auch der internationale Jurist die Situation, indem er erklärt, dass die Einheit des Staates – die hier im Kontext des Fehlens der Gewaltenteilung steht – durch die Einheit der äußeren und der inneren Souveränität gebildet wird. Wie der Staat hinsichtlich des internationalen Rechts mit der Benennung des Feindes über das *ius ad bellum* entscheidet, so muss der Führer-Richter im Inneren bestimmen, wer der Feind ist. Die Bewahrung der Legitimität des monarchischen Staatsideals (Bodin, Hobbes, Donoso Cortés) und der Legitimationsmuster der konstitutionellen Monarchie (Constant) bildete im Zeichen einer antipluralistischen und antisozialistischen Perspektive – denn das rechtsstaatliche Ideal der substantiellen, von Moral und Rechtmäßigkeit getrennten neutralen Legalität zerstörte den deutschen Staat und lieferte ihn seinen Feinden aus – dann 1934 die Grundlage für die Feststellung Schmitts: „der Führer schützt das Recht".

Ausgehend von unserer Werteordnung ist es wünschenswerter, dass uns das Recht schützt. Auch soll die Entscheidung über die konkreten rechtlichen Verhältnisse nicht in den Händen eines Führers, sondern in denen der Justiz liegen – zumindest im Falle unserer stationären gesellschaftlichen Situation.

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RESÜMEE

Zwei Terrains des Dezisionismus bei Carl Schmitt: auf der Makroebene der Souveränität und auf der Mikroebene des richterlichen Urteils

PÉTER SZIGETI

Der Verfasser analysiert die in der Überschrift der Studie genannten zwei wichtigen Ebenen des Dezisionismus, dieser originalen Leistung von Schmitt. Er erörtert die Analyse des Standpunktes der Politischen Theologie über die Souveränität aus Sicht der Rechtsstaatlichkeit. Eine Klärung der Rechtsordnung des normalen Zustandes, der außergewöhnlichen Ordnung des Ausnahmezustandes und des Verhältnisses zwischen diesen beiden wird durch eine begriffliche Analyse des Verhältnisses *Gegensatz*, des *Widerspruchs* und des Widerspruchs der *antagonistischen* Art möglich. Die kategorialen Differenzen zwischen diesen sind nämlich bei Schmitt infolge des Gebrauchs ‚des Intensitätsgrades des Gegensatzes' verschwommen, obwohl das Problem auch in der begrifflichen Analyse des Politischen implizit enthalten ist. Das zwischen den rivalisierenden politischen Kräften bestehende gegensätzliche Freund-Gegner-Verhältnis entspricht nämlich der Rechtsordnung des *Normal*zustandes, während das Freund-Feind-Verhältnis nur mehr durch die *außergewöhnliche Rechtsordnung* des Ausnahmezustandes vermittelt werden kann. Und der politischen Qualität des antagonistischen Widerspruchsverhältnisses (Bürgerkriege, gesamtnationale Krisen) entsprechen die (revolutionären, konterrevolutionären) Rechtszustände der *illegitimen Rechtsentstehung*.

Die nicht ganz unberechtigte „Zurechnungspunkt"-Kritik des Dezisionisten Schmitt wird auf der Mikroebene des richterlichen Urteils von Szigeti durch methodische Metakritik streitig gemacht: er weist darauf hin, dass hier die Aufgabe der Dezision das Ausfüllen des hiatus irrationalis, der zwischen der Normenlogik und der Ontität aufgestellten Spannung sein wird. Der abstrakte Rationalismus von Schmitt überschlägt in einen Irrationalismus an der Stelle, wo er nicht konkretisiert, welcher Natur diese Dezision ist. Die Lokalisierung des Standpunktes des „Normativen Nichts" fasste Schmitt als eine existenzphilosophisch fundierte Gegebenheit auf, die weder begrifflich noch empirisch geprüft werden kann. Nicht unabhängig davon, durch welche philosophisch-weltanschauliche Motive er sich leiten ließ, als er sich die in der heutigen Rechtsphilosophie fachwissenschaftlich thematisierten Lösungen einst vorstellte.

SUMMARY

Carl Schmitt's Two Realms of Decisionism: the Macro-Level of Sovereignty and the Micro-Level of Judicial Decisions

PÉTER SZIGETI

The author analyses the two above-mentioned noteworthy realms of decisionism, which is Schmitt's original theory. Szigeti discusses the notion of sovereignty of political theology from the viewpoint of the rule of law. In order to clarify the relationship between the legal order of the normal state and the emergency order of the state of emergency, the author analyses antinomies of three types: *discord*, *contradiction* and *antagonism*. As Schmitt approaches those categories by examining the „intensity of the level of opposition" in them, the demarcation lines between those categories are blurred even though, implicitly, that issue comes up in the analysis of the notion of the political (*das Politische*). Note that the antinomy in the friend-opponent relationship corresponds to the legal order of the *normal* state, while the friend-enemy relationship can only be associated with the *emergency legal order* of the state of emergency. As far as the political character of antagonistic antinomies is concerned (as for instance, civil wars and nationwide crises), they correspond to the legal states of *illegitimate legal phenomena* (revolutionary or counterrevolutionary).

On the micro-level of judicial decisions Szigeti challenges Schmitt's partly justified decisionist *Zurechnungspunkt* [terminus of accountability] with a metacriticism of method: Szigeti points out that decisionism will have the task of an irrational easing of the tension and hiatus between normal logic and onticism. Schmitt's abstract rationalism transforms into irrationalism when he fails to describe in concrete terms the nature of decisionism. For Schmitt the localization of the standpoint of „normative nothingness" cannot be inspected either notionally or experimentally, which Schmitt considers a circumstance that can only be interpreted in terms of existential philosophy. Such a consideration is related to the philosophical motivations Schmitt once had when he created those categories, and which keep recurring in the contemporary discourse of legal theorists.

THE ROLE OF LINGUISTIC RIGHTS IN THE POLITICAL REPRESENTATION OF MINORITIES

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If we imagine a conceptual scale with minority languages at one end and the political representation of minorities at the other, we may place two other notions in between, which mediate between, and link them: the linguistic rights, which ensure the use of minority languages, and the linguistic minorities as the subjects of those rights. Positive international law does not acknowledge minority communities as subjects, speaks instead of individual entitlements possessed by individuals belonging to those minorities, of entitlements, which they enjoy together with other members of the minority. In view of the sensitivity of majority states, international law tends not only to avoid talk of collective subjects, but also makes conscious efforts to keep the protection of minority languages and cultures at a safe distance from conceptions, which conjure up the threat of a political division of power. Thus the European Charter for Regional or Minority Languages does not mention neither individual nor collective rights, only state obligations. There is even a possibility of choice with respect to Chapter III., where the obligations are to become concrete measures. The European Charter for Regional or Minority Languages does not speak in terms of subjects of rights either, only in terms of users of regional or minority languages. The Charter protects the regional or minority languages as a part of the European cultural heritage.

Minority rights are human rights, consequently, the state in which the minority lives is the prime duty-bearer of minority rights. The protection basically depends on the domestic constitutional system of the state. But even if the state is a perfect democracy, – which state is that? – it could happen that it is a majoritarian democracy, where „winners take all" and pay no significant attention to minority wishes, without heed as to whether the groups belong to political, ethnic or any other minority. To belong to a minority is never an advantage. Moreover, as one of the founding fathers of the US Constitution, Madison stated: „In all cases, where a majority is united by a common interest or passion, the rights of the minority are in danger."[1] In this danger the Jacobin con-

[1] As quoted by John Elster: „On Majoritarianism and Rights." *East European Constitutional Review*, vol. 1, no. 3, 1992 Fall, p. 20.

cept of nation state satisfies itself with the equality before the Constitution, not paying attention to such particularities as language, or culture.

The benevolent effort made in the European Charter for Regional or Minority Languages to separate political sensitivities from state obligations to protect minority languages cannot be considered successful. This is indicated by the fact that as far as Eastern and Central Europe is concerned, only Croatia, Hungary, Slovakia, and recently Armenia take part in the co-operation under the Charter – where are the others? –, and that the Constitutional Council of France declared the French ratification of the document irreconcilable with the idea of the unitary, indivisible republic. If we look for evidence outside the Charter, it is enough to refer to the Act on State Language of Slovakia under Prime Minister Meciar. This Act was planned to eradicate traces of the Czech language from the official communication, and to secure the pure Slovak as possibly the only vehicle of it by severely limiting the official use of minority languages. Another example bearing the same mixture of tragic and comic elements is provided by the efforts of the former president of Croatia, Tudjman, who, according to well established rumours invented (or discovered) every week, probably with the help of linguists, original Croatian words and expressions to replace words or expressions, which sounded identical with, or very similar to the corresponding Serbian words, and who even sent linguists to Burgenland, to the neighbouring Austria to bring home Croatian vocabulary, which had been preserved intact from Serbian influence in the Old Croatian vernacular of the minority Croatians living there.

If we think about the question arising implicitly from the title, we will find three areas, which – in my view – deserve special examination. They are: linguistic rights and representation *in a broad sense*, use of the minority language *in the bodies of political representation*, and the issue of minority self-government in linguistic and cultural matters, i.e. the matter of *cultural autonomy*. After a discussion of these matters, I will shortly examine the situation in Hungary.

Language and the culture based on it are somehow automatically synonymous with some sort of representation of the minority. Language is one of the most important expressions of a sense of collective identity, which has been imbued with a mythical significance in Eastern and Central Europe. Count István Széchenyi once said that a nation lives in its vernacular. Language and culture are a kind of mythical home, supposed to substitute for a collective home not existing in reality. The use of geographic and other names of settlements in the minority language in everyday life may be an outward expression of the authentic existence, authentic living of the community in the given physical space. Therefore, if public administration law allows the use of the minority

language for names of settlements and other geographic names, there are only two ways left for a majority nationalist to deny the existence of a minority community. One is to question that the number of the minority reaches the limit stipulated by law, and the other, if the first one does not prove successful, to stick to an interpretation, according to which the law allows only the use of translations of the majority names instead of the use of the original names established in the minority language. That was exactly what happened in certain places, when the new Romanian public administration act came into force on May 2001, which allows the use of the local minority language in public affairs.

The authentic existence of minority communities may undermine majority myths of origin. In such a mythical frame of thought, legislative acts which allow for an official expression of minority existence through the minority language, these being the legal expressions of the majority will, appear as the work of a Satanic conspiracy. Any setting aside of the state language is tantamount to questioning the nation state, those who use their own language appear as traitors to unity. (And if they speak in the majority language, as some hard – headed nationalists think, they must be doing it in order to conceal their nature as infiltrators.)

The use of the minority language in public life extends to organs of political representation. In this case symbolic expression and actual representation are combined. Practical problems arise when the two functions come into conflict. What I am referring to is the possibility that in default of appropriate infrastructural facilities, representatives of local authorities or parliaments may find themselves reducing their chances for an effective representation of interests. They come to be seen as troublemakers, who make the work of representative organs more complicated and more expensive. Thus if oral contributions are made, the minutes will be prepared in the majority language.

From the symbolic point of view the occasional use of a minority language in the national parliament, or the use of the minority language by the head of state, or by other political leaders is of outmost importance. After the death of General Franco in Spain a speech delivered by King Juan Carlos in Catalan in Barcelona proved to be an important factor in the political and social reconciliation process. It is a clear sign of uneasiness towards minority languages that their use in the Slovakian Parliament is still forbidden.

Special difficulty is involved in attempts to reconcile linguistic and political representation in political systems, which are based on linguistic-cum-territorial divisions. A case in point is *Mathieu-Mohin and Clerfayt*,[2] which arose in

[2] Mathieu-Mohin and Clerfayt, Judgment of 2 March 1987, A.113 (1987) pp. 22-23.

Belgium and was treated by the European Court of Human Rights. In Belgium there are community and regional councils. The particular community councils have competence in matters of use of Flemish, French and German, as well as in cultural and educational issues concerning the linguistic communities mentioned. In the French speaking territory tasks of administration are performed by the Walloon regional council, while in Flanders this is also attended to by the Flemish community council. This means that in Flanders the community and the regional councils have been united, unlikely to the Walloon part. There are Flemish and Walloon factions in the Parliament, both in the House of Representatives and in the Senate. In the undivided bilingual electoral district Brussels-Hal-Vilvorde, which comprises the French – speaking territory of Hal-Vilvorde, which lies in the Flemish region, and part of the bilingual capital Brussels, representatives are free to decide which linguistic faction they wish to join. They join the faction in which language they take the oath. The Walloon representatives Mathieu-Mohin and Clerfayt were elected in the French – speaking region, which belongs to Flanders. If they take their oath in Dutch, they cannot take part in the work of the French speaking community, whose competence in cultural and educational matters extends over the Walloon citizens in their district. If, on the other hand, they take the oath in French, they exclude themselves from the council of the Flemish community, which administrates other matters. Finally, they decided themselves for the French oath, but at the same time they filed a complaint at the European Court of Human Rights in Strasbourg alleging a violation of Article 3 of the First Protocol to the European Convention of Human Rights (the right to free elections) and to Article 14 of the Convention (the prohibition of discrimination). The European Court of Human Rights rejected the complaint, stating that the goal behind the Belgian legal solution was to alleviate linguistic tension, and to promote, while maintaining decision based on qualified majority and other guarantees, the election of minority representatives, who speak the majority language of the region, since participation in the Flemish council was important to the regional French speaking population as well, and was not in breach of the Convention.

In practice, the use of minority languages in representative bodies, as well as the demand for minority languages in general, is a question of a minimal proportion defined by law. In Finland, districts of public administration qualify as bilingual if the percentage of the Swedish-speaking population reaches eight percent of the total population. Under the previous Croatian minority law, the use of the minority language in local governments became obligatory, when the minority was the local majority (at least 51 %). The weakness of international legal regulation is its tendency to avoid saying anything in concrete terms, it only contains general rules – this is the way the most important European instrument has been formulated. Article 10 (2) of the Framework Convention for

the Protection of National Minorities confines itself to saying meaningless generalities leading to no concrete obligations. „In areas inhabited traditionally or in substantial numbers by persons belonging to national minorities, if those persons so request, and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities." On top of all that, the Convention is silent on the situation within local authorities (Article 10). The European Charter for Regional or Minority Languages speaks about protection justified by the number of people using the minority language and establishes the possibility that the party states may choose obligations that will secure the use of the minority language in local or regional assemblies as well.

One of the crucial questions for linguistic minorities is, whether they have an opportunity to take part in decisions on linguistic policies and linguistic planning. This may be decisively influenced by the official view regarding the nature of the linguistic entity involved, i.e. whether the official view defines it as a language or merely as a dialect, since protection is due to the former but not to the latter. Giving a hearing to the organisations advocating use of the minority language is part of a democratic process, but objective circumstances may be at odds with the demands articulated by such organisations. The issue may even be complicated by a difference of scientific opinion, but the debate may of course be of a political nature and may give rise to different opinions of the same linguistic entity in different states. Limburger is a language on its own right in the Netherlands, but only a dialect of Flemish in Belgium. There may also be a debate concerning the character of the language. Kven is acknowledged as a language on its own right by Norwegian authorities, but is considered to be identical with Finnish, while the people who use the language consider it a self-contained, original language. The outcome of the debate seems to be perfectly irrelevant, but really the exact opposite is the case. If Kven is identical with Finnish, it is sufficient to import the educational materials and cultural products from Finland, and to provide for access to Finnish radio and television, while in the contrary case all these are to be provided in the original. The upshot of all this is that, while minorities have educational and cultural autonomy in several states, only the first (existence) of these basic issues is decided by the minorities, the second (language or dialect? what sort of language?) is decided by the majority state. And it is the second kind of question that sets the terms of reference between which the decision on protection is formulated.

In its original cast, cultural autonomy is seen as based on the classic freedoms, which require only toleration from the state. The minority community takes the opportunity offered by freedom of association and education to establish its own institutions and exercise its rights of self-government. The state may lay down quality requirements (concerning curricular, acquisition of certificates etc.) and as was stated by the Supreme Court of the US, may seek guarantees that the schools educate pupils to become 'good citizens'. For a long time, that was the frame of reference invoked by international law to conceive cultural autonomy. The change was ushered in by statements as to the positive obligations of the state vis-a-vis minorities. In fact, in international law this does not involve the requirement that the provision of financial and infrastructural facilities should go together with the transfer to the minorities of the right to decide on these matters affecting these conditions of identity. In Eastern and Central Europe this is supplemented by the problem, which we might call the ambivalent relationship between minorities and the majority states. Minorities have every reason to be afraid of the majority states, since the states have never been neutral in conflicts between coexisting ethnic groups. They have never made an attempt to find and establish the precarious balance between majority interests and minority rights. This is further aggravated by the tendency of majority states to regard the existence of minorities as a threat to national security, so they strive for assimilation. On the other hand, minorities expect the state to provide subsidies for their educational and cultural institutions. This is a consequence not only of the practice of the omnipotent state, but also of the fact that minorities are poor. Of course, it is more advantageous for the majority state to preserve dependence on the central budget, than to give civil associations or churches property or to establish a legal way for them for getting a share from local taxes, so that they can finance their institutions from their own resources. Cultural autonomy, however, if implemented at all, is likely to remain formal as long as every penny depends on the good will of the majority. Even minorities themselves may think twice before undertaking the building up of cultural autonomy. This is exactly the case in Hungary, where the 1993 Minority Act laid down the legal foundations not only for establishing and maintaining educational and cultural facilities, but also provided that minority self-governments should take over their management from territorial authorities. Minority authorities, however, were motivated by fears that the state budget would leave them to their own devices after once facilities had gone over to the control of the minority self-government. (The amendment to the Hungarian Minority Act now being envisaged is hoped to remedy this problem by offering legal and financial guarantees.)

The implementation of minority language rights in Hungary leaves much to be desired. This is so despite the fact that legal regulation is satisfactory, indeed, unrealistically promising. Looking at the causes, we may mention first of all the fact that minorities are in a state of advanced linguistic assimilation, and that they are geographically scattered and fragmented across the country's territory, mostly mixed with the majority population. Not even this geographic location can justify, however, the now valid equal rights of all minorities in complete disregard of numbers (a community of a few hundreds or thousands of citizens as opposed to a hundred thousand, or two). It is equally unreasonable that minority linguistic rights extend to the whole territory of the country.[3] If we look at the issue of equal rights for minorities we cannot but think that it will defy implementation: how can one expect to employ officials who master Bulgarian or Armenian, to provide sample forms in these languages, or even to see to the provision of an interpreter in these languages across the whole country. This is an unrealistic expectation, even in case of the most extensive minority languages (German and Croatian) that speakers of these languages should be able to exercise their right to use their mother tongue in the other corner of the country (say a Croatian speaker from the area of the South-Hungarian town of Pécs in Hajdúszoboszló, a town in the north-east.) The lack of nationality registration makes it difficult to designate those territories, where minority language rights should be applied. But it is possible, after all, to combine estimates with census data so as to get to a list of localities inhabited by minorities, where their proportions reach at least ten to twenty percent. Special attention should be paid to the Roma languages 'lovari' and 'beás', since those who use these languages are facing not only the problem of preserving their identity but also, and more importantly, they are in bad need of aid for social integration and alleviation of socio-economic backwardness.

In order to protect minority languages and cultures, appropriate legal regulation is not enough: infrastructural offers are needed on the part of the majority state. However, if minorities are not afforded adequate political representation, they hardly stand a chance of acquiring the opportunities afforded by those offers.

[3] It has been underlined by the Expert Committee of the European Charter for regional or Minority Languages. See, ECRML (2001) 4, 4 October 2001, *Application of the Charter in Hungary - Report of the Committee of Experts of the Charter*, para 46.

SUMMARY

The Role of Linguistic Rights in the Political Representation of Minorities

GÁBOR KARDOS

In the introduction the author examines why it is a sensitive political question for certain countries to grant minorities the right to use their mother tongue. He points out that such sensitivity has made it necessary to create the European Charter for Regional or Minority Languages, which protects minority languages as parts of the European cultural heritage without formally granting linguistic rights. In the main body of the text the author puts forward his thought under four headings, such as *(1)* the linguistic rights of minorities and the political representation of minorities in general (in this context he states that a minority's independent language and culture represent the very existence of that minority); *(2)* the use of minority languages in political representative institutions (in that connection he stresses the problems caused by practical obstacles); *(3)* cultural autonomy (where the guarantees of financing are crucial); *(4)* and the enforcement of linguistic rights of minorities in Hungary. As for the latter issue, the author emphasizes the negative consequences of the fact that the Hungarian Parliament entered into legal commitments that proved to be overly ambitious.

The essence of the essay is that it is not sufficient to guarantee the linguistic rights of a minority, if this is not accompanied by the insurance of a proper infrastructure for the exercise of those rights. As long as minorities lack proper political representation, their chances of winning those rights remain slim.

RESÜMEE

Rolle der Sprachenrechte in der politischen Vertretung von Minderheiten

GÁBOR KARDOS

Der Verfasser untersucht in der Einführung des Essays, warum in einigen Staaten die Gewährung des Rechts auf Gebrauch der Muttersprache von Minderheiten als eine politisch brisante Frage behandelt wird. Dabei verweist er darauf, dass diese Empfindlichkeit die Ursache dafür ist, dass die Europäische Charta der Regional- oder Minderheitensprachen diese Sprachen als Teil des europäischen Kulturerbes schützt, ohne Sprachenrechte formal zu garantieren. Im Hauptteil des Essays gruppiert der Verfasser seine Gedanken um die folgenden vier Fragen: *(1)* die Sprachenrechte der Minderheiten und die politische Vertretung der Minderheiten im Allgemeinen – in diesem Zusammenhang argumentiert er dafür, dass die selbständige Sprache und Kultur eine Art Vertretung der Existenz sind; *(2)* der Gebrauch der Minderheitensprache in den Organen der politischen Vertretung, wobei er die Probleme betont, welche durch die Barrieren in der Praxis entstehen; *(3)* das Problem der kulturellen Autonomie, bei der der Verfasser die Wichtigkeit der Garantie der Finanzierung hervorhebt; *(4)* die Durchsetzung der Sprachenrechte von Minderheiten in Ungarn, wo er auf die misslichen Folgen eines rechtlichen Überbürdens aufmerksam macht.

Der Verfasser ist der Auffassung, dass es seitens des Mehrheitsstaates nicht genügt, die Sprachenrechte der Minderheiten zu garantieren, sondern er müsse den Minderheiten in dieser Hinsicht sozusagen ein infrastrukturelles Angebot machen. Haben die Minderheiten aber keine angemessene politische Vertretung, dann haben sie kaum die Chance, dieses auch tatsächlich zu bekommen.

„WITNESS EVIDENCE" IN PRIVATEN SCHIEDSVERFAHREN MIT EUROPÄISCHER UND US-AMERIKANISCHER BETEILIGUNG

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1. Einleitende Bemerkungen

Der Beweis durch Beweispersonen spielt nicht nur im ordentlichen Zivilprozess, sondern auch in Schiedsverfahren eine bedeutende Rolle. Bekanntlich weisen die verschiedenen Rechtsfamilien (Rechtskreise) große Unterschiede hinsichtlich der Ausgestaltung dieser Beweismittel auf. Insbesondere trifft diese Behauptung auf das Verhältnis zwischen dem anglo-amerikanischen und dem kontinental-europäischen Rechtskreis zu. Begegnen sich nun Parteien (und/oder Schiedsrichter) aus diesen unterschiedlichen Rechtskreisen in einem internationalen Schiedsverfahren, so stellt sich die Frage, nach welchen Regeln das Beweisverfahren betreffend die Beweispersonen ablaufen soll. Damit die Konsensualität des Schiedsverfahrens gewährleistet bleibt und der Bestand des Schiedsspruchs nicht gefährdet wird, müssen hier solche Verfahrensregeln Anwendung finden, die für alle Beteiligten akzeptabel sind. Solche Regeln, gewissermaßen „gemeinsame Nenner" kann man nur mit Hilfe der Prozessrechtsvergleichung identifizieren. Für die Zwecke transatlantischer, und damit für die internationalen Handelsbeziehungen sehr wichtiger Schiedsverfahren bieten sich als Vergleichsgrundlage das deutsche und das US-amerikanische Prozessrecht an. Sie repräsentieren nämlich in vieler Hinsicht Extrempositionen der beiden genannten Rechtskreise. Der letzte Teil der vorliegenden kleinen Studie, der die Praxis internationaler Schiedsgerichte aufarbeitet, wird daher die Ergebnisse des nunmehr vorzunehmenden Rechtsvergleichs reflektieren.

Im Bereich des Beweises durch Beweispersonen sollen im Folgenden nur der Zeugen- und der Parteibeweis erörtert werden. Der Sachverständigenbeweis bleibt in der vorliegenden Abhandlung ausgeklammert. Damit steht die Systematisierung der Darstellung bereits hier vor der Schwierigkeit, dass sich die beiden behandelten Rechtskreise schon in ihrem Ausgangspunkt voneinander unterscheiden. Während nämlich die kontinental-europäischen Rechtsordnungen eindeutig zwischen Zeugen und Sachverständigen sowie zum Teil auch zwischen Zeugen und Parteien eine strenge Trennlinie ziehen, fasst die anglo-amerikanische Tradition all diese personalen Beweismittel unter dem Begriff

des Zeugen (witness) zusammen. Da gleichzeitig die deutschrechtliche strikte Trennung des Zeugenbeweises von der Parteivernehmung und die damit einhergehende nachrangige Behandlung der Letzteren international immer mehr in Isolation geraten und diese beiden Beweismittel vom Sachverständigenbeweis in einer auch für das amerikanische Verständnis nachvollziehbaren Weise abgegrenzt werden können, sollen zunächst Zeugen- und Parteibeweis zusammen behandelt werden. Dabei muss jener konzeptionelle Unterschied stets im Auge behalten werden, nach dem die deutsche Auffassung den Zeugen und insbesondere den Sachverständigen in einer gewissen grundsätzlichen Richternähe, als Helfer des Entscheidungsorgans sieht, wohingegen die für die vorliegende Untersuchung des angelsächsischen Rechtskreises repräsentative US-amerikanische Tradition die gleichen Beweismittel in Parteinähe ansiedelt und sie in erster Linie als Interessenvertreter der Parteien betrachtet. Die hieraus konsequent folgende Unterstellung der Partei dem Zeugenbegriff sowie das Zerfallen des Verfahrens in eine pre-trial- und eine trial-Phase im amerikanischen Recht einerseits, die auch bei den personalen Beweismitteln fortgeltenden grundsätzlichen Unterschiede in der prozessualen Rollenverteilung andererseits erklären ähnlich wie beim Urkundenbeweis auch hier die zuweilen unüberbrückbar erscheinenden Abweichungen in der Art und Weise der Beweiserhebung. Im Vorfeld spektakulärer Wirtschaftsprozesse hat sich gerade in den letzten Jahren gezeigt[1], dass die personalen Beweismittel solche Unterschiede auf beiden Seiten des Atlantiks aufweisen, die zumindest im gleichen Maße wie beim Urkundenbeweis einen Aufbauunterschied des Verfahrens und damit – vor allem in Europa – einhergehende Ängste verursachen. All dies macht die genauere Identifizierung der Unterschiede und die Suche nach den Elementen einer sich für die Zwecke internationaler Schiedsverfahren eignenden kompromissfähigen Verfahrensweise bei der Erhebung dieser Beweismittel notwendig.

2. Die deutschrechtliche Differenzierung

2.1. Die überkommene Unterscheidung zwischen Partei- und Zeugenbeweis

Die kontinental-europäische und insbesondere die deutsche Verfahrensrechtstradition sehen den Zeugen und erst recht die Partei als die unzuverlässigsten Beweismittel an.[2] Dies resultiert zum einen aus dem Spannungsverhältnis, das die Stellung der Partei als Beweismittel charakterisiert: Sie ist in der Regel über

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[1] Vgl. z.B. das Interview mit dem New Yorker Anwalt der Kläger im Rechtsstreit zwischen Daimler-Chrysler und den die Übernahme rügenden Aktionären: Die Welt, 6. November 2002, S. 16. Dazu auch Klaus *Sachs*, Use of documents and document discovery: „Fishing expeditions" versus transparency and burden of proof, SchiedsVZ 2003, 193, 194.

[2] Über die Kommentierungen vor § 373 ZPO hinaus vgl. nur Matthias *Einmahl*, Zeugenirrtum und Beweismaß im Zivilprozess, NJW 2001, 469 ff. und Ulrich *Foerste*, Parteiische Zeugen im Zivilprozess, NJW 2001, 321 ff.

den zugrundeliegenden Sachverhalt am besten informiert, ist aber zugleich am Ausgang des Rechtsstreits in höchstem Maße interessiert. Auf dieses Spannungsverhältnis kann eine Verfahrensrechtsordnung mit mehreren möglichen Vorgehensweisen antworten. Sie kann sich mit einem Verweis auf die freie richterliche Beweiswürdigung begnügen. Ferner kann sie zusätzlich starke dialektische Kontrollmechanismen (etwa ein wenig eingeschränktes Kreuzverhör) ins Verfahren einbauen, damit diese die interessenbedingten Verzerrungen der Sachverhaltsdarstellung zutage fördern. Das Verfahrensrecht kann aber das Problem auch so zu lösen versuchen, dass es die Einführung des Parteiwissens ins Verfahren von vornherein mehr oder weniger einschränkt.[3] Diesen letztgenannten Weg wählt immer noch das deutsche Recht. Ausgangspunkt der deutschen gesetzlichen Regelung ist die vielkritisierte Differenzierung zwischen Zeugen- und Parteivernehmung, wobei letztere grundsätzlich nur subsidiär zum Einsatz kommen kann. §§ 445, 447 ZPO ziehen der Parteivernehmung enge Grenzen: Dem Gegner soll erst nach Ausschöpfung sämtlicher anderer Beweismittel die Vernehmung zugemutet werden, während die beweispflichtige Partei sich selbst nur mit Einverständnis des Gegners vernehmen lassen kann.

Damit sind bereits auch die Grenzen des Zeugenbeweises abgesteckt: Zeuge kann nur sein, wer nicht als Partei im Prozess vernommen werden kann.[4] Das geht auf den römischrechtlichen Grundsatz „nemo in propria causa testis esse debet" zurück und soll bewirken, dass die am Ausgang des Verfahrens interessierten Parteien nicht bzw. nicht in erster Linie durch eigene Bekundungen ihrer Beweisführungslast genügen können sollen. Die ganze Regelung der §§ 445 ff. ZPO schöpft noch aus dem überkommenen Gedankengut des Parteieides. Sie trägt insbesondere der freien richterlichen Beweiswürdigung nicht das gebührende Vertrauen entgegen.[5] All das beschränkt in der Praxis die Rolle des Parteibeweises und damit die oft unentbehrliche Einbringung von Parteiwissen ins Verfahren sehr, was von der Mehrheit der Stimmen aus Literatur und Praxis als misslich und auch als verfassungsrechtlich problematisch empfunden wird.[6] Die Unhaltbarkeit der Differenzierung zwischen Zeugen und Parteien zeigt sich besonders plastisch etwa im Bereich des Gesellschaftsrechts. Hier kann es we-

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[3] Ebenso die Zusammenfassung des Problems von *Kollhosser*. Vgl. Klaus *Oepen*, Bericht über die Diskussion zum Thema „Parteiaussage und Parteivernehmung am Ende des 20. Jahrhunderts", ZZP 113 (2000), 347, 359.

[4] Vgl. nur *MünchKomm/Damrau*, § 373 Rn. 7; *Thomas/Putzo/Reichold*, ZPO vor § 373 Rn. 6.

[5] Vgl. *AK-ZPO/Rüßmann*, vor § 445 Rn. 3; Paul *Oberhammer*, Parteiaussage, Parteivernehmung und freie Beweiswürdigung am Ende des 20. Jahrhunderts, ZZP 113 (2000), 295, 297 ff., 326.

[6] Vgl. z.B. Dagmar *Coester-Waltjen*, Parteiaussage und Parteivernehmung am Ende des 20. Jahrhunderts, ZZP 113 (2000), 269 ff; Paul *Oberhammer*, o. Fn. 5, ZZP 113 (2000), 295, 307; Gerhard *Wagner*, Europäisches Beweisrecht: Prozessrechtsharmonisierung durch Schiedsgerichte, ZEuP 2001, 441, 494; Markus *Gehrlein*, Warum kaum Parteibeweis im Zivilprozess?, ZZP 110 (1997), 451, 466 ff.

gen der formalistischen Betrachtungsweise der ZPO etwa vorkommen, dass zum Ablauf und Inhalt eines Vier-Augen-Gesprächs zwischen dem Alleingeschäftsführer einer GmbH (oder dem Komplementär einer KG oder einem Einzelunternehmer) und dem Angestellten eines Kreditinstituts Letzterer ohne Weiteres als Zeuge vernommen werden kann, wohingegen die Vorgenannten wegen ihrer haftungs- und vertretungsrechtlichen Stellung nicht als Zeugen in Frage kommen.[7] Ein wichtiges Urteil des EGMR hat gerade eine solche Gestaltung des niederländischen Rechts für einen Verstoß gegen Art. 6 EMRK gehalten.[8] Doch auch in anderen Fallgestaltungen führt die Trennung zu mit dem materiellen Recht unvereinbaren und daher untragbaren Ergebnissen. Stellvertretend sei hier nur die treffende Kritik *Gerhard Wagners* an der geltenden Rechtslage zitiert: „Völlig desavouiert wird der normative Ausgangspunkt des deutschen Rechts schließlich, wenn die Praxis es zulässt, den Zedenten einer Forderung in dem vom Zessionar angestrengten Prozess als Zeugen zu vernehmen."[9] Inzwischen ist zum Teil in Anlehnung an die Rechtsprechung des EGMR in Deutschland die Differenzierung auch aufgeweicht, vor allem in den genannten Fällen der Vier-Augen-Gespräche.[10] Wenn, mit der Argumentation des BGH, der Zeugenbeweis hier hinreichend durch die freie Beweiswürdigung des Gerichts korrigiert werden kann, ist es nicht einzusehen, warum bei der Partei dies nicht ebenso zutrifft. Viele Stimmen in der Literatur plädieren für einen größeren Spielraum des Parteibeweises bzw. für die völlige Abschaffung der Differenzierung.[11] Auch die internationale Tendenz in diese Richtung ist unverkennbar, wie etwa unlängst publizierte rechtsvergleichende Studien eindeutig gezeigt haben.[12] Neben dem BGH[13] geht in letzter Zeit auch eine Entscheidung des Bundesverfassungsgerichts in diese Richtung.[14]

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[7] Vgl. Hilmar *Raeschke-Kessler*, Kann die Zivilgerichtsbarkeit von der internationalen Schiedsgerichtsbarkeit lernen?, FS Geiß, S. 155, 160 f.

[8] *EGMR 27.10.1993 (Dombo Beheer B.V./Niederlande)*, ZEuP 1996, 484 ff. Dazu Gerhard *Wagner*, o. Fn. 6, ZEuP 2001, 441, 490 f.

[9] Gerhard *Wagner*, o. Fn. 6, ZEuP 2001, 441, 493 (unter Hinweis auf BGH WM 1976, 424). Ebenso zu diesen Schwierigkeiten bereits Heinrich *Nagel*, Die Grundzüge des Beweisrechts im europäischen Zivilprozess – Eine rechtsvergleichende Studie, Baden-Baden 1967, S. 241.

[10] Vgl. Peter *Schlosser*, EMRK und Waffengleichheit im Zivilprozess, NJW 1995, 1404 ff.

[11] Vgl. für die Aufwertung des Parteibeweises z.B. Markus *Gehrlein*, o. Fn. 6, ZZP 110 (1997), 451 ff. Für die Abschaffung der Differenzierung z.B. Gerhard *Wagner*. Für Letzteren vgl. Klaus *Oepen*, o. Fn. 3, ZZP 113 (2000), 347, 350.

[12] Vgl. die einschlägigen rechtsvergleichenden Untersuchungen von *Coester-Waltjen*, o. Fn. 6, ZZP 113 (2000), 269 ff; Paul *Oberhammer*, o. Fn. 5, ZZP 113 (2000), 295, 307; Gerhard *Wagner*, o. Fn. 6, ZEuP 2001, 441, 494.

[13] Vgl. z.B. BGH NJW 1999, 363 sowie weitere Nachweise bei Gerhard *Wagner*, o. Fn. 6, ZEuP 2001, 441, 491.

[14] Vgl. BVerfG NJW 2001, 2531.

Ein weiteres Sonderproblem wirft allerdings die Frage auf, wie die wohl beinahe einvernehmlich geforderte „Gleichstellung" von Zeugen- und Parteibeweis erfolgen soll. Dieses Problem resultiert aus der Systematik der ZPO, die die Äußerungen der Partei auf zwei verschiedenen Stufen behandelt. Zur Ergänzung und Klärung des Sachvortrags der Partei („interrogatio ad clarificandum positiones") gedacht ist die Parteianhörung nach §§ 141, 278 ZPO. Sie ist kein Beweismittel sondern nur Parteivortrag zur Klärung streitiger Punkte im Parteivorbringen ohne Bindungswirkung.[15] Demgegenüber ist die Parteivernehmung nach §§ 445 ff. ZPO, wenn sie überhaupt angeordnet wird, echtes Beweismittel. Nun möchte eine „radikalere" Meinung die oben erwähnte Gleichstellung des Parteibeweises mit dem Zeugenbeweis unter gleichzeitiger Abschaffung dieser sinnentleerten Unterscheidung innerhalb des Parteibeweises vollzogen sehen.[16] Die Anhörung nach § 141 ZPO sei nämlich ohne Weiteres in eine Parteivernehmung nach § 448 zu überführen.[17] Das „Ritual" der nach dieser Meinung sinnlosen Trennung der beiden sei abzuschaffen, da bereits in der Anhörung nach §§ 141, 273, 278 ZPO alles an Information von den Parteien zu holen sei, was noch in der Vernehmung rituell geholt werden könnte.[18] Die Gegenmeinung will nicht ganz so weit gehen: Nach ihr sollte zum Einen größerer Gebrauch von § 448 ZPO, also der amtswegigen, nicht dem Subsidiaritätsprinzip unterliegenden Parteivernehmung gemacht werden. Damit könnte eine praktische Gleichstellung mit den anderen Beweismitteln erreicht werden.[19] Oder aber sei § 445 ZPO dahingehend zu erweitern, dass eine Vernehmung auf Antrag auch ohne Subsidiarität großzügig zugelassen werden sollte. Dieser Lösungsansatz möchte aber die Parteivernehmung so mit dem Zeugenbeweis auf den gleichen Rang heben, dass dabei die Differenzierung zwischen

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[15] Vgl. BGH NJW-RR 1994, 1143 f.

[16] So z.B. in ihren Diskussionsbeiträgen Helmut *Rüßmann* und Reinhard *Greger*. Vgl. Klaus *Oepen*, o. Fn. 3, ZZP 113 (2000), 347, 348 f., 352.

[17] Ebenso bereits Heinrich *Nagel*, o. Fn. 9, S. 303. Vgl. auch Rolf *Meyke*, Die Funktion der Zeugenaussage im Zivilprozess, NJW 1989, 2032, 2034. Kritisch dazu Markus *Gehrlein*, o. Fn. 6, ZZP 110 (1997), 451, 465.

[18] Dafür und konsequent für die Abschaffung der §§ 445 ff. ZPO: *AK-ZPO/Rüßmann*, vor § 445 Rn. 3 ff. Vgl. auch ebd. in Rn. 5: „Alles in allem ist ... die Parteianhörung schon heute geeignet, die Parteivernehmung vergessen zu machen. ... den misslichen Folgen entgegenzuwirken, die sich ...ergeben, wenn der interessengebundene Verhandlungspartner der einen Seite als Zeuge zur Verfügung steht und der anderen Seite die Schranken des Parteibeweises vorgehalten werden."

[19] Dies fordert im Ergebnis die Mehrheit der Prozessrechtswissenschaft, wie aus den Diskussionsbeiträgen in der zu diesem Thema organisierten Konferenz hervorgeht. Vgl. Klaus *Oepen*, o. Fn. 3, ZZP 113 (2000), 347 ff. Ebenso der Vorschlag von Markus *Gehrlein*, o. Fn. 6, ZZP 110 (1997), 451, 475.

Anhörung und Vernehmung – wegen ihrer funktionalen Verschiedenheit – unangetastet bleiben soll.[20]

Es ist nicht die Aufgabe der vorliegenden Untersuchung zu entscheiden, welchem Lösungsweg der Vorzug zu geben ist. Vielmehr ist hier mit Blick auf die Verwertbarkeit der nationalen Ergebnisse für die internationale Schiedsgerichtsbarkeit nur festzuhalten, dass alle Meinungen die deutsche Gesetzeslage kritisieren und im Ergebnis für die Gleichrangigkeit[21] von Zeugenbeweis und Parteivernehmung eintreten. Diese Forderung findet eine ihrer festesten Grundlagen im Vertrauen auf die Ausgleichsfunktion der freien richterlichen Beweiswürdigung, die dazu geeignet ist, das Interessiertsein der Partei hinreichende Berücksichtigung finden zu lassen.

2.2. Weitere, für die Zwecke des Vergleichs wichtige Merkmale des Zeugenbeweises nach deutschem Recht

Nach den zentralen Normen der §§ 396, 397 ZPO läuft die Zeugenvernehmung im Rahmen einer spontanen Berichterstattung und anschließender Befragung ab. Zunächst soll der Zeuge seine Wahrnehmungen im Zusammenhang, möglichst unbeeinflußt und ohne Unterbrechung[22] präsentieren können. Grundsätzlich kommt es erst anschließend zu einer ergänzenden Befragung durch das Gericht. Zuletzt haben auch die Parteien bzw. ihre Prozessvertreter ein Fragerecht. Diese Gesetzessystematik vermittelt zugleich auch eine bindende Reihenfolge der zur Befragung Berechtigten, d.h. das Fragerecht der Parteien bzw. der Anwälte eröffnet sich erst nach der Befragung durch das Gericht im Beweistermin.[23] Discovery-Elemente wie protokollierte Zeugenbefragung und theatralische Einübung der Aussage vor der Verhandlung sind dementsprechend dem deutschen Verfahrensrecht – zusammen mit den anderen kontinentalen Rechtsordnungen – eher fremd und jedenfalls bei weitem nicht in den amerikanischen Maßstäben zu eigen.[24] Im Gegensatz zum US-amerikanischen

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[20] Dafür Dagmar *Coester-Waltjen*, o. Fn. 6, ZZP 113 (2000), 269, 293 und Paul *Oberhammer*, o. Fn. 5, ZZP 113 (2000), 295, 320 f. sowie in seinem Diskussionsbeitrag Gerhard *Wagner*. Vgl. für Letzteren Klaus *Oepen*, o. Fn. 3, ZZP 113 (2000), 347, 350.

[21] Im Sinne von Gleichstufigkeit der Erhebung, nicht von inhaltlicher Gleichwertigkeit. Dazu vgl. Klaus *Oepen*, o. Fn. 3, ZZP 113 (2000), 347, 350, 362.

[22] Vgl. *MünchKomm/Damrau*, § 396 Rn. 2.

[23] Vgl. *MünchKomm/Damrau*, § 397 Rn. 2.

[24] Wobei die neue Berufsordnung der Rechtsanwälte vom 29.11.1996 im Gegensatz zum früheren, vom Bundesverfassungsgericht beanstandeten Verhaltenskodex hierzu schweigt. Einen – freilich sehr allgemeinen – Anhaltspunkt enthält damit nur noch § 43 BRAO, der eine gewissenhafte Berufsausübung verlangt. Kritisch und für eine Neueinführung des ausdrücklichen

System erfährt der Zeuge erst im Vernehmungssaal mit Genauigkeit das Beweisthema. Der Beweisbeschluss und damit der genaue Gegenstand seiner Anhörung (§ 359 Nr. 1 ZPO) werden ihm – wie aus der Formulierung des § 377 I ZPO ersichtlich („... unter Bezugnahme auf den Beweisbeschluss ...") – nicht schon mit der Ladung mitgeteilt. Lediglich über den Vorfall im allgemeinen, zu dem er vernommen werden soll, wird er in der Ladung ins Bild gesetzt.[25]

§ 397 ZPO sieht die Möglichkeit einer Befragung des Zeugen durch die Parteien vor. Streng abzugrenzen ist jedoch die hier vorgesehene Verfahrensweise von einem cross examination US-amerikanischen Stils. Selbst das Verfahren nach § 397 II ZPO, im Rahmen dessen die Parteien nicht nur Fragen vorlegen lassen sondern selbst den Zeugen befragen können, erreicht nie die Grenze eines Kreuzverhörs. Es sind vielmehr immer nur einzelne, bestimmte Fragen zur Sache zu stellen. Eine umfassende Glaubwürdigkeitsprüfung durch Befragung und eine etwaige Konfrontierung des Zeugen mit früheren Aussagen zur Erschütterung seiner Glaubwürdigkeit sind durch diese Vorschrift nicht gewährleistet.[26] Dies schließt andererseits nicht aus, dass das Gericht den Parteien eine weitgehende Einflussnahme auf die Zeugenbefragung gewährt und sogar zuerst die Parteien Fragen stellen lässt. Bei einer solchen Vorgehensweise muss es streng unparteiisch bleiben und auf die Gleichbehandlung der Parteien achten.[27]

Gegenüber dem US-amerikanischen Recht gibt es kein Bedürfnis nach Regeln, die bestimmte Frage- bzw. Aussageninhalte von vornherein ausschließen. Solche evidence rules sollen im US-amerikanischen Prozess die Überzeugungsbildung der jury vor unsachlicher Beeinflussung schützen. Im ohne Laienbeteiligung ablaufenden deutschen Zivilprozess reicht etwa bei Zeugen von Hörensagen eine besonders sorgfältige Prüfung im Rahmen der freien Beweiswürdigung durch den Richter.[28]

Zeugenbeeinflussungsverbots Sven *Timmerbeil*, Witness Coaching und Adversary System, Tübingen 2004, S. 139.

[25] Ebenso, unter Hinweis auf den zu vermeidenden Suggestiveffekt *AK-ZPO/Rüßmann*, § 359 Rn. 3 und §§ 394-397 Rn. 4.

[26] Vgl. *AK-ZPO/Rüßmann*, §§ 394-397 Rn. 2: „Restbestände des Kreuzverhörs"; *Thomas/Putzo/Reichold*, § 397 Rn. 1.

[27] Vgl. Rolf *Meyke*, o. Fn. 17, NJW 1989, 2032, 2034. Vgl. auch die vielen, auch in der Schiedsgerichtsbarkeit zu beherzigenden Vorschläge betreffend äußere Gestaltung der Vernehmung *AK-ZPO/Rüßmann*, §§ 394-397 Rn. 4 ff.

[28] Vgl. BVerfG NJW 1981, 1719, 1725 f; BGH NJW 1994, 2904.

Schließlich soll noch die sich gerade in Schiedsverfahren einer immer wachsenden Beliebtheit erfreuende und deswegen besonders bedeutsame Möglichkeit der schriftlichen Zeugenaussage kurz angesprochen werden. Seit der Novellierung des § 377 ZPO im Jahre 1990[29] kommt der Möglichkeit in § 377 III ZPO vor deutschen Gerichten wachsende Bedeutung zu. Wie aus dem Wortlaut der Vorschrift ersichtlich, macht die schriftliche Zeugenaussage die persönliche Vernehmung grundsätzlich nicht gegenstandslos.[30] Eine solche Ersetzungsfunktion kann zwar der schriftlichen Aussage zukommen, doch ist dies in der Praxis auch wegen ihrer gegenüber der mündlichen Vernehmung geminderten Beweiswertes wohl eher selten.[31] Ihrer anderen Funktion kommt hingegen größere Bedeutung zu. Es handelt sich dabei um die effektive Vorbereitung der Zeugenvernehmung in der Verhandlung mit Hilfe vorher eingereichter schriftlicher Aussagen, zum Teil unter Anlehnung an das US-amerikanische Beispiel.[32] Die Regelung der ZPO eröffnet den Weg zur Nutzbarmachung der positiven Seiten dieser US-amerikanischen Methode[33] der Einführung des Zeugenbeweises ins Verfahren, ohne ihre Nachteile gleichzeitig in Kauf nehmen zu müssen. In klarer Abgrenzung zur pre-trial deposition gilt nämlich auch im Bereich der von § 377 III ZPO erfassten Fälle der Grundsatz, dass Zeugenbeweis nur auf Antrag und auf anschließende gerichtliche Anordnung erhoben wird. Keineswegs kann es also in diesem Rahmen zu typischen US-amerikanischen pre-trial depositions kommen, die vor der Verhandlung in Eigenregie der Parteien und ihrer Anwälte und ohne Zutun des Gerichts von statten gehen.[34]

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[29] Vgl. § 377 III ZPO u.a. als Ergebnis von Prozessrechtsvergleichung (u.a. in Anlehnung an das französische prozessrechtliche Institut der *attestation*, Art. 199 ff. NCPC. Vgl. den entsprechenden Hinweis bei Rolf *Stürner* – Astrid *Stadler*, Eigenarten der Prozessrechtsvergleichung, in: Peter *Gilles* (Hrsg.), Transnationales Prozessrecht, Baden-Baden 1995, S. 286 und Astrid *Stadler*, Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess, ZZP 110 (1997), 137, 151 ff. Ferner s. auch den vergleichenden Hinweis von Astrid *Stadler*, Die Europäisierung des Zivilprozessrechts, in: Festgabe 50 Jahre BGH, München 2000, S. 645, 673.

[30] Vgl. *MünchKomm/Damrau*, § 377 Rn. 16.

[31] Zu den Gründen vgl. Astrid *Stadler*, o. Fn. 29, ZZP 110 (1997), 137, 149, 163.

[32] Astrid *Stadler*, o. Fn. 29, ZZP 110 (1997), 137, 163 f. stellt das noch auszuschöpfende Potenzial solcher „präparatorischer" schriftlicher Zeugenaussagen heraus.

[33] Vgl. Astrid *Stadler*, o. Fn. 29, ZZP 110 (1997), 137, 165.

[34] Ebenso *MünchKomm/Damrau*, § 377 Rn. 1.

3. Die Eigenheiten des US-amerikanischen Zeugenbeweises

3.1. Der umfassende Zeugenbegriff

Bereits in der Beantwortung der Grundsatzfrage, wer Zeuge sein kann, unterscheidet sich das US-amerikanische Verfahrensrecht wesentlich von seinem deutschen Pendant.[35] Der angelsächsische Rechtskreis verabschiedete sich in der zweiten Hälfte des 19. Jahrhunderts Schritt für Schritt von den für den Parteibeweis geltenden Einschränkungen. Demgemäß kennt das US-amerikanische Recht auch keine Differenzierung zwischen Zeugen, Sachverständigen und Parteien als Beweismitteln, sondern behandelt alle einheitlich als Zeugen (witnesses of fact, party witnesses, expert witnesses). Hiervon zeugt der erste Satz von Rule 601[36] der Federal Rules of Evidence.[37] Abgesehen von den nur noch in wenigen Einzelstaaten geltenden sog. „Dead Man Statutes", die den Parteibeweis in bestimmten Situationen ausschließen, gibt es keine Einschränkung der Vernehmung der Parteien als Zeugen. Dies mag auf den ersten Blick gerade im Vergleich mit dem ohne Laienbeteiligung ablaufenden deutschen Zivilprozess verwundern. Gerade im amerikanischen Geschworenenprozess würde eine Einschränkung des Parteibeweises wegen der möglichen unsachlichen Beeinflussung der jury als eher gerechtfertigt erscheinen, während dem deutschen Berufsrichter mehr Differenzierungsvermögen zugetraut werden könnte. Das US-amerikanische System des Beweises durch Beweispersonen hält aber andere Kontrollmechanismen für diese Situation bereit. Das Parteiinteresse kann nach einhelliger Meinung im Rahmen der freien Beweiswürdigung genügend berücksichtigt werden. Die Durchführung von Zeugenvernehmungen wird im ganzen angelsächsischen Rechtskreis für grundsätzlich unverzichtbar für die restlose Sachverhaltsaufklärung gehalten.[38] Angesichts dieses Grundwertes kommt eine Zurückdrängung des Parteibeweises wegen Interessiertseins nicht in Frage. Stattdessen wird neben der freien Beweiswürdigung das Kreuzverhör als Ausgleichsmechanismus herangezogen. Im Rahmen der dialektischen Vernehmung setzen die gegnerischen Anwälte alles daran, ein Interessiertsein der Beweispersonen herauszustellen und damit die Glaubwürdigkeit der Zeugen der Gegenseite zu erschüttern bzw. die Glaubwürdigkeit der eigenen Beweispersonen zu bestätigen. Die beiden Kontrollmechanismen freie Beweiswürdi-

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[35] Zu den historischen Gründen und rechtsvergleichend vgl. Dagmar *Dreymüller*, Der Zeugenbeweis im Zivilprozess im common law und im deutschen Recht – Eine rechtsvergleichende Betrachtung der Ausgestaltung und des Wertes des Zeugenbeweises im englischen und im deutschen Zivilprozess mit Hinweisen auf das US-amerikanische Recht, Diss. Münster 2000, S. 40 ff.

[36] „Every person is competent to be a witness except as otherwise provided in these rules."

[37] Im Weiteren: F.R.Evid.

[38] Vgl. *McCormick*, On Evidence, Vol. 1 § 19.

gung und cross examination machen für das amerikanische Verständnis sowohl eine strikte Trennung zwischen den einzelnen personalen Beweismitteln als auch einen Subsidiaritätsgrundsatz im Sinne des deutschen Rechts sinnlos und überflüssig.

3.2. Die zweistufige dialektische Vernehmung

Wie beim Urkundenbeweis ist die zeitliche Aufteilung der Sachverhaltsermittlung zwischen pre-trial und trial auch für die Ausgestaltung des weitverstandenen Zeugenbeweises ein bestimmendes Merkmal. Der zweistufige Aufbau führt nämlich beim Zeugenbeweis dazu, dass das im oben herausgestellten Sinn als Kontrollmechanismus gedachte Kreuzverhör nicht erst in, sondern bereits vor der Verhandlung eine wichtige Rolle erlangt. Dabei geht es im Wesentlichen um Folgendes. Seit der Einführung der initial disclosures im Zuge der Reform vom Jahre 1993 haben die mit der automatischen anfänglichen Offenlegungspflicht praktisch funktionsgleichen interrogatories nach Rule 33 Federal Rules of Civil Procedure[39] rasant an Bedeutung verloren. Die Identifizierung möglicherweise relevanter Beweismittel ist bereits im Rahmen der initial disclosures nach Rule 26 F.R.C.P. Parteipflicht. Nach dieser frühen Identifizierung kann alsdann zur inhaltlichen Befragung der gegnerischen Partei bzw. ihrer Zeugen geschritten werden. Das hierfür vorgesehene Instrument ist die in den Rules 27 ff. F.R.C.P. geregelte pre-trial deposition, die nach Rule 27 ausnahmsweise zu Beweissicherungszwecken sogar vor Klageerhebung zulässig ist.[40] Den Grundfall bildet jedoch die mündliche[41], protokollierte Befragung nach Anhängigkeit und vor der Verhandlung nach Rule 30 F.R.C.P. Dabei verweist Rule 30(c) ausdrücklich auf die Anwendbarkeit der F.R.Evid. und ermöglicht damit u.a. die Durchführung eines vollständigen Kreuzverhörs bereits in vor der Verhandlung stattfindenden Befragungen: „Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence..." Wie später noch einmal in der Verhandlung befragt also in der Regel den Zeugen zuerst der Anwalt der den Zeugen präsentierenden Partei (*direct examination*) und anschließend der gegnerische Anwalt (*cross examination*). Hierauf folgt unter Umständen eine Rückrunde, vor allem, wenn die Glaubwürdigkeit des Zeugen im Kreuzverhör erschüttert worden ist. Die Rückrunde besteht dann in der gleichen Reihenfolge wie zuerst aus einem *re-direct* und einem möglichen *re-cross examination*. Das Protokoll von der so ablaufenden deposition wird nicht selten im während der Verhandlung wiederholten Kreuzverhör wieder bedeutsam, wenn eine Beweis-

[39] Im Weiteren: F.R.C.P.

[40] Vgl. zu dieser Ausnahmesituation *State of Arizona v. State of California*, 292 U.S. 341.

[41] Die schriftliche Befragung nach Rule 31 F.R.C.P. spielt nur eine untergeordnete Rolle.

person ihrer früheren protokollierten Aussage widerspricht. Sinn und Zweck der im Zuge der beiden letzten Reformen wegen Missbrauchsanfälligkeit zahlenmäßig und zeitlich eingeschränkten depositions ist nicht zuletzt auch die Förderung der Vergleichsbereitschaft. Häufig erübrigt sich die Hauptverhandlung mit nochmaligem Kreuzverhör, nachdem eine gleichwertige Beweiserhebung bereits vor der Verhandlung die Streitpunkte geklärt hat. Wie die sonstigen discovery-Methoden, spielen sich auch die depositions in alleiniger Partei(Anwalts)regie ab, wobei das Gericht auch hier Schutzanordnungen (protective orders) erlassen und die Mitwirkung sanktionierend (u.a. contempt of court[42]) erzwingen kann.

Kommt es zur Verhandlung, so spielt sich ein ähnliches Szenario vor dem Richter und den Geschworenen ab. Auch hier führen die Anwälte die Befragung durch. Das Gericht hat grundsätzlich nur Kontrollfunktionen und soll unter Umständen unsachliche Befragungen unterbinden. Dabei kommen die Instrumente zum Einsatz, die die wirkliche Wahrheitsermittlung sicherzustellen und zugleich eine unsachliche Beeinflussung der Geschworenen auszuschließen berufen sind. Es geht dabei im Wesentlichen um die Rules of Evidence und speziell um die Einschränkungen in den rules of hearsay[43], opinion evidence, parol evidence sowie leading questions gegenüber dem eigenen Zeugen.[44] Auf das weitverästelte Gebiet des Evidence soll hier schon deswegen nicht weiter eingegangen werden, weil es für die ohne Laienbeteiligung funktionierende Schiedsgerichtsbarkeit praktisch bedeutungslos ist.

Die Durchführung eines Kreuzverhörs gilt im Grunde als prozessuales Grundrecht.[45] Sein Methodenkanon hat sich während der Jahrhunderte zu einer eigenständigen Kunst[46] entwickelt. Es ist wohl eine der spektakulärsten Manifestationen des adversary system. Allerdings führt seine Allgegenwart (vor und in der Verhandlung) zu Erscheinungen, die weniger mit der Wahrheitsermittlung, dagegen mehr mit der bewussten Manipulierung des Entscheidungsorgans zu tun haben. Die geschilderte zweistufige Konfrontierung der Beweispersonen mit den Anwälten, ferner die Absicht, bei den Geschworenen einen günstigen Eindruck zu hinterlassen, machen die professionelle Vorbereitung der Zeugen auf die Befragungen zu einem stilprägenden Merkmal des US-amerikanischen Verfahrensrechts. Für die Beweispersonen ist die ganze Vorverhandlungsphase

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[42] Sowie mittels weiterer Sanktionen nach Rule 37 F.R.C.P.

[43] Rule 602 mit Rule 802 F.R.Evid.

[44] Vgl. zu diesen nur die kurze Zusammenfassung bei Dagmar *Dreymüller*, o. Fn. 35, S. 56 ff.

[45] Vgl. nur *Alford v. U.S.*, 282 U.S. 687, 691 (1931). Aus dem Schrifttum vgl. *McCormick*, On Evidence, Vol 1 § 19; ferner die gute Zusammenstellung von Zitaten bei Sven *Timmerbeil*, o. Fn. 24, S. 41.

[46] Vgl. z.B. Lewis W. *Lake*, How to Cross-Examine Witnesses Successfully, New Jersey 1957.

gekennzeichnet durch die als *witness-coaching*[47] berühmtgewordene Reihe von Vorbereitungshandlungen. Der Kontakt zwischen Anwalt und Zeugen unterliegt in der US-amerikanischen Praxis keinen standesrechtlichen Einschränkungen[48], das richtige Trainieren des Zeugen wird vielmehr von einem guten Prozessvertreter erwartet.[49] Rule 11(b) F.R.C.P. könnte sogar als gesetzliche Grundlage der Präparierung von Zeugen (und Sachverständigen) angesehen werden, verpflichtet sie doch den Anwalt zu Nachforschungen, bevor er in seinen eröffnenden Schriftsätzen Behauptungen aufstellt und Beweismittel benennt.[50] Nicht nur die Vernehmung im Gerichtssaal sondern bereits die deposition durch die Gegenseite wird normalerweise „geprobt" („rehearsal of testimony"). Diese Vorgehensweise ist auch in den USA scharfer Kritik ausgesetzt.[51] Einer der Hauptkritikpunkte dabei ist, dass man im adversary system bewusst die Gefahr in Kauf nimmt oder aber sogar anstrebt, dass der Zeuge sich im Laufe der pre-trial interviews mit einer nicht mehr wahrheitsgemäßen Aussage über einen Geschehensablauf identifiziert.[52]

Die angelsächsische Methode, „die mit ihrem eingehenden Kreuzverhör nicht selten – namentlich bei böswilligen, unpräzisen oder widerspenstigen Zeugen – weit zuverlässigere Ergebnisse zu liefern vermag als die für den Zeugen viel bequemere Vernehmungsmethode des deutschen Rechts"[53], hat zwar nachtei-

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[47] Für eine Definition vgl. Sven *Timmerbeil*, o. Fn. 24, S. 21.

[48] Zu den ABA Model Rules of Professional Conduct und anderen einschlägigen Regelwerken vgl. Sven *Timmerbeil*, o. Fn. 24, S. 73 ff.

[49] Zu den Methoden vgl. m.v.Nachw. Sven *Timmerbeil*, o. Fn. 24, S. 22 ff.

[50] Die hier interessierenden Teile der Vorschrift lauten folgendermaßen: „By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

[51] Vgl. John *Langbein*, The German Advantage In Civil Procedure, 52 U. Chicago L.Rev. 823 (1985).

[52] Diese Erscheinung ist aber jeder Beweisrechtsordnung zu eigen, weil eine solche Identifizierung letzten Endes psychologisch bedingt ist, und nicht unbedingt durch Anwälte hervorgerufen wird, sondern durch andere Umstände. Vgl. dazu Martin *Hohlweck*, Die Beweiswürdigung: Beurteilung von Zeugenaussagen, JuS 2002, 1105, 1108. Vgl. dazu ausführlich Rolf *Bender* – Armin *Nack*, Tatsachenfeststellung vor Gericht, 2. Auflage, München 1995, Rn. 110 ff; Helmut *Rüßmann*, Die Zeugenvernehmung im Zivilprozess, DRiZ 1985, 41 ff.

[53] Ernst J. *Cohn*, Beweisaufnahme im Wege der zivilprozessualen Rechtshilfe durch das englische Gericht, ZZP 80 (1967), 230, 231.

lige und für kontinentale Vorstellungen befremdliche Seiten. Dies darf jedoch noch nicht zu der Annahme verleiten, es fehle ihr an Kompromissfähigkeit mit den kontinentalen Prozessrechten. Darüber hinaus, dass kontinentalen Strafverfahren selbst das Kreuzverhör nicht fremd ist, sollte in diesem Kontext beachtet werden, dass kontinentale und insbesondere auch deutsche Gerichte sich im Wege der Rechtshilfe bereit dazu gefunden haben, angelsächsischen Anwälten – etwa in einem Beweisrechtshilfeverfahren nach dem Haager Beweisrechtsübereinkommen vom Jahre 1970[54] – cross examinations zu erlauben.[55] Diese Möglichkeit ist auch seitens der Wissenschaft überzeugend bestätigt worden.[56] Das Kreuzverhör ist eindeutig gedeckt durch das HBÜ, nach dem bei der Beweisrechtshilfe besondere Verfahrensarten nach dem Recht des ersuchenden Staates beachtet werden können.[57] Es ist kein Grund zu ersehen, warum etwa kontinentaleuropäische ordre public-Bedenken gegen das Kreuzverhör an sich vorgebracht werden könnten.[58] Im Gegenteil sollte man davon ausgehen, dass es sich hierbei schlicht um eine andersgeartete Methode der Überprüfung der Glaubwürdigkeit der Zeugen handelt, die zwar ihre Wurzeln im anglo-amerikanischen Recht hat, unstreitig aber mit wesentlichen Grundsätzen der deutschen Rechtsordnung vereinbar ist. Wie auch bei den anderen Ermittlungsmethoden bildet wohl auch hier das Vorhandensein der richterlichen Kontrolle die Grenzlinie.[59] Diese Kontrolle kann sicherstellen, dass es auch auf dem Rechtshilfeweg zu keinem Ausforschungsbeweis und zu keinem Einschleichen eines echten adversary process kommt. Hat man sich aber von der grundsätzlichen Vereinbarkeit des Kreuzverhörs mit dem deutschen Recht im Wege der Rechtshilfe überzeugt, so hat das für die anschließend zu behandelnde Verwertbarkeit dieser Vernehmungsmethode in rechtskreisübergreifenden Schiedsverfahren bedeutenden Erkenntniswert.

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[54] Im Weiteren: HBÜ.

[55] Vgl. nur OLG München v. 31.10.1980 und OLG München v. 27.11.1980, beide u.a. in: JZ 1981, 538 ff.

[56] Vgl. nur Joseph F. *Weis*, The Hague Evidence Convention and United States Civil Procedural Rules, ZVglRWiss 90 (1991), 411, 415.

[57] Vgl. Art. 9 HBÜ.

[58] Ebenso im Ergebnis Frank *Schäffler*, Zulässigkeit und Zweckmäßigkeit der Anwendung angloamerikanischer Beweismethoden in deutschen und internationalen Schiedsverfahren, Frankfurt a.M. – München 2003, S. 91 ff.

[59] Vgl. Peter *Schlosser*, Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen, ZZP 94 (1981), 369, 387, 389.

4. Der Zeugenbeweis vor internationalen Schiedsgerichten

4.1. Die Regelung der jeweiligen lex fori

Die kodifizierten Rechtsquellen in den untersuchten Rechtsordnungen bieten lediglich ansatzweise Anhaltspunkte hinsichtlich des Zeugenbeweises. Im Gegensatz zum Sachverständigenbeweis findet sich in der ZPO keine eigene Regelung für den Zeugenbeweis. Daher muss auf die die Gestaltungsfreiheit statuierende Generalklausel in § 1042 ZPO[60] zurückgegriffen und deren Inhalt konkretisiert werden.

Insbesondere ist zu berücksichtigen, dass die überholte und in vielen Verfahrenssituationen nicht interessengerechte Differenzierung zwischen Partei- und Zeugenstellung, wie sie aus der Gesetzessystematik der §§ 373 ff. und 445 ff. ZPO folgt, für Schiedsverfahren im Sinne des 10. Buches der ZPO keine Geltung besitzt.[61] Statt der Subsidiarität – die sich ja bereits auch im ordentlichen Prozess als problematisch erwiesen hat – kann die Parteiaussage primär als Beweismittel ins Schiedsverfahren eingeführt werden. Die freie schiedsrichterliche Beweiswürdigung fungiert dabei als ausreichendes Gegengewicht gegenüber der womöglich einseitigen und unzuverlässigen Aussage der interessierten Partei.[62] Als zusätzliche Sicherung kommt die Aufhebungsklage in Betracht, wenn der Schiedsspruch auf täuschender Zeugen- oder Parteiaussage beruht. Ähnlich wie bei der Restitutionsklage nach § 580 Nr. 3, 4 i.V.m. § 581 ZPO sieht die Rechtsprechung dabei für die Aufhebung als Voraussetzung an, dass wegen der als Aufhebungsgrund geltendgemachten Straftat eine rechtskräftige Verurteilung ergangen ist.[63]

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[60] Im Einklang mit Art. 19 UNCITRAL Model Law bestimmt der hier relevante Teil der Vorschrift der ZPO: „...vorbehaltlich der zwingenden Vorschriften dieses Buches das Verfahren selbst oder durch Bezugnahme auf eine schiedsrichterliche Verfahrensordnung regeln. Soweit eine Vereinbarung der Parteien nicht vorliegt und dieses Buch keine Regelung enthält, werden die Verfahrensregeln vom Schiedsgericht nach freiem Ermessen bestimmt. Das Schiedsgericht ist berechtigt, über die Zulässigkeit einer Beweiserhebung zu entscheiden, diese durchzuführen und das Ergebnis frei zu würdigen."

[61] Ebenso Jens-Peter *Lachmann*, Handbuch für die Schiedsgerichtspraxis, 2. Auflage, Köln 2002, Rn. 804. Allgemein für internationale Schiedsverfahren vgl. z.B. Emmanuel *Gaillard* – John *Savage* (eds.), On International Commercial Arbitration, The Hague/Boston/London 1999, Rn. 1280.

[62] Ebenso Jean-François *Poudret* – Sébastien *Besson*, Droit comparé de l'arbitrage international, Brüssel 2002, Rn. 656.

[63] So z.B. OLG Stuttgart vom 3.6.2003.

Auch die sonstigen für den Zeugenbeweis einschlägigen Regeln des Verfahrens im ersten Rechtszug sind für deutsche Schiedsverfahren nicht zwingend.[64] Dies wirkt sich etwa auf die Art der Vernehmung von Zeugen aus. Abweichend vom ordentlichen Verfahren braucht der Schiedsrichter nicht erst auf einen spontanen ununterbrochenen Bericht im Zusammenhang hinzuwirken. Er kann vielmehr auch gleich mit gezielten klärungsbedürftigen Spezialfragen beginnen. Auch ist kein Grund zu ersehen, warum er nicht gestatten könnte, dass die Parteien selbst nicht nur Fragen vorlegen lassen sondern selbst unmittelbar den Zeugen befragen und unter Umständen die Anwälte ein – freilich schiedsrichterlich kontrolliertes – Kreuzverhör durchführen.[65] Schließlich kann das Schiedsgericht, wenn es ihm förderlich erscheint, auch auf eine Diskussion zwischen den Zeugen hinwirken.[66]

In den USA kann im Gegensatz zur deutschen Rechtslage grundsätzlich von einer Fortgeltung der geschilderten staatlichen Verfahrensweise ausgegangen werden. Depositions, subpoenas, cross examinations und witness coaching gehören auch zur Schiedsverfahrenspraxis.[67] Beim Kreuzverhör ist dies umso verständlicher, als es von der Rechtsprechung als wesentlicher Bestandteil des fairen Verfahrens überhaupt angesehen wird.[68] Problematisch ist dabei nur die Beurteilung der Möglichkeit von pre-arbitral depositions am Beispiel von pretrial depositions. Die einzige bundesrechtliche Vorschrift, die für den Zeugenbeweis einschlägig ist, spricht gegen eine solche Möglichkeit. Section 7 Federal Arbitration Act[69] regelt nämlich nach ihrem Wortlaut nur die Erscheinungspflicht und die Aussage in der Verhandlung, nicht aber die Möglichkeit einer pre-arbitral discovery (deposition).[70]

Trotz des eindeutigen Wortlauts gibt es zwei sich widersprechende Rechtsprechungslinien unter den US-Gerichten. Ein Teil der Rechtsprechung hält strikt am Wortlaut fest[71], wohingegen andere Bundesgerichte auch depositions vor

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[64] Vgl. z.B. Ottoarndt *Glossner* – Jens *Bredow* – Michael *Bühler*, Das Schiedsgericht in der Praxis, 3. Auflage, Heidelberg 1990, Rn. 380.

[65] Im Ergebnis auch Jens-Peter *Lachmann*, o. Fn. 61, Rn. 814 f., 818.

[66] Vgl. Jens-Peter *Lachmann*, o. Fn. 61, Rn. 816.

[67] Vgl. Thomas E. *Carbonneau*, in: Frank-Bernd *Weigand* (ed.), Practitioner's Handbook on International Arbitration, München/Copenhague 2002, Rn. 114 ff.

[68] In diesem Sinne z.B. *Nestel v. Nestel*, 331 N.Y. 2d 241 (A.D. 1972).

[69] Im Weiteren: FAA.

[70] Der relevante Teil von sec. 7 FAA lautet: „The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness ... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court..."

[71] Vgl. z.B. *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 276 (C.A.4 (Va.), 1999); *Integrity Insurance Co. v. American Centennial Insurance Co.*, 885 F.Supp. 69 (S.D.N.Y. 1995).

der Schiedsverhandlung für zulässig und erzwingbar halten.[72] Dabei handelt es sich größtenteils um Probleme, die im Zusammenhang mit Rechtshilfeersuchen von Schiedsparteien aufkommen. Deswegen ist dies vornehmlich ein Problem der staatlichen Rechtshilfe zugunsten Schiedsverfahren.[73] Hier reicht es zunächst festzuhalten, dass ein großer Teil der Rechtsprechung mit dem Wortlaut der Vorschrift von der Unanwendbarkeit bzw. Unvereinbarkeit von pre-arbitral depositions mit dem Wesen der Schiedsgerichtsbarkeit ausgeht. Dies steht auch mit der in dieser Arbeit bereits gewonnenen Erkenntnis in Einklang, wonach für pre-trial discovery-Methoden in Schiedsverfahren selten ein Bedürfnis besteht. Hiervon bestehen insbesondere bei drohendem Beweismittelverlust und dadurch bedingter Notwendigkeit von Beweissicherung Ausnahmen. Eine entsprechende Anwendung der deposition-Vorschriften der F.R.C.P. scheint die zitierte Regel des Federal Arbitration Act auch dadurch ausschließen zu wollen, dass sie eindeutig von schiedsrichterlicher Ladung und von einer Erscheinenspflicht vor den Schiedsrichtern spricht. Hätte der Gesetzgeber den Weg der gewöhnlichen depositions eröffnen wollen, so hätte er – im Sinne eines echten adversary process – die Befugnisse der Parteien bzw. ihrer Anwälte bei der Ladung bzw. bei der Vernehmung festgelegt. Angesichts der divergierenden Rechtsprechung kann es jedoch in Schiedsverfahren mit Schiedsort in den USA aus der Sicht der Durchführbarkeit von depositions verstärkt darauf ankommen, in welchem Bundesstaat das Schiedsgericht seinen Sitz hat.[74]

Während der Verhandlung ist die Rechtslage unproblematisch. Die bestimmende Rolle des cross examination setzt sich hier fort. Dabei kommt wieder zwangsläufig den Anwälten die Hauptrolle zu. Sowohl auf Bundesebene als auch im Recht der Einzelstaaten sichern die Schiedsgesetze bzw. die einschlägige Rechtsprechung die Möglichkeit des Kreuzverhörs in Schiedsverfahren ausdrücklich zu.[75]

Die Tatsache, dass die Differenzierung zwischen Zeugen- und Parteibeweis in deutschen Schiedsverfahren nicht gilt, ferner der Umstand, dass nach der herrschenden Meinung dieselbe Differenzierung selbst im ordentlichen deutschen Zivilprozess obsolet geworden ist, sind starke Indizien dafür, dass eine optimale und kompromissfähige Ausgestaltung in internationalen Schiedsverfahren bei der für das amerikanische System selbstverständlichen Gleichstellung die-

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[72] Vgl. z.B. *Amgen Inc. v. Kidney Center of Delaware County Ltd.*, 879 F.Supp. 878 (N.D.Ill.,1995).

[73] Vgl. hier nur Gary B. *Born*, International Commercial Arbitration – Commentary and Materials, 2nd Edition, Ardsley/The Hague 2001, S. 487.

[74] Wegen der Zuständigkeitsregel in sec. 7 FAA: „... the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons ...".

[75] So m. w. Nachw. Christian *Borris*, Die internationale Handelsschiedsgerichtsbarkeit in den USA, Köln 1987, Rn. 221 f.

ser personalen Beweismittel ansetzen muss. Ähnlich kann wohl das Kreuzverhör als ein Grundbaustein des Zeugenbeweises in internationalen Schiedsverfahren in Frage kommen, da es mit deutschen Vorstellungen nicht grundsätzlich unvereinbar und für das amerikanische System unentbehrlich ist.

4.2. Die Regelung in ausgewählten wichtigen Schiedsordnungen

Die Mehrheit der gängigen Schiedsordnungen macht einen Mittelweg zwischen den unterschiedlichen Vernehmungsmethoden möglich.[76] Hierauf kann angesichts der oft nicht sehr wortreichen Regelung[77] entweder aus Sekundärquellen, aus Berichten von Praktikern und aus manchen publizierten verfahrensleitenden Entscheidungen geschlossen werden. In der Praxis wird die Vernehmung in der Verhandlung grundsätzlich den Parteien bzw. ihren Anwälten überlassen, wobei das Schiedsgericht immer eine Kontrolle ausübt und Zusatzfragen stellt. Die meisten Schiedsordnungen schließen auch die Durchführung eines Kreuzverhörs nicht aus und diese Vernehmungsmethode wird zunehmend auch in kontinentalen Schiedsverfahren praktiziert.[78] Damit nähert sich die Methode der Vernehmung eher dem US-amerikanischen Modell an.[79]

Die *UNCITRAL Rules* enthalten in Art. 25 neben Fristbestimmungen lediglich die Statuierung der freien Gestaltung des Zeugenbeweises sowie die Möglichkeit der Präsentierung von schriftlichen Zeugenaussagen. Die überlieferte Entstehungsgeschichte zeigt jedoch, dass die Urheber wie selbstverständlich von der Zugrundelegung der angelsächsischen Methode der Zeugenvernehmung ausgingen und ein Ausbleiben von cross examinations lediglich in Ausnahmefällen – nämlich bei mangelnder Kompetenz der einen Seite – erwogen wurde.[80]

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[76] So z.B. Alan *Redfern* – Martin *Hunter*, Law and Practice of International Commercial Arbitration, London 1999, Rn. 6-76.

[77] Vgl. Jean-François *Poudret* – Sébastien *Besson*, o. Fn. 62, Rn. 656.

[78] S. auch die weiteren Nachweise bei Klaus Peter *Berger*, Internationale Wirtschaftsschiedsgerichtsbarkeit, Verfahrens- und materiellrechtliche Grundprobleme im Spiegel moderner Schiedsgesetze und Schiedspraxis, Berlin – New York 1992, S. 303 f. Ferner ebenso Emmanuel *Gaillard* – John *Savage* (eds.), o. Fn. 61, Rn. 1287.

[79] Vgl. z.B. Axel H. *Baum*, Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis, FS Böckstiegel, S. 21, 25; *Juris Classeurs, Procédure civile*, Fasc. 1068 (S. 43, 44 par Emmanuel *Gaillard*); Torsten *Lörcher*, Neue Verfahren der internationalen Streiterledigung in Wirtschaftssachen, Frankfurt am Main 2001, S. 274.

[80] Vgl. Stewart Abercrombie *Baker* – Mark David *Davis*, The UNCITRAL Arbitration Rules in Practice, Deventer/Boston 1992, S. 125. In diesem Sinne auch Mauro *Rubino-Sammartano*, Rules of Evidence in International Arbitration – A Need for Discipline and Harmonization, JIntArb 3(2), 87, 90 (1986).

Auch die *ICC Rules* behandeln den Zeugenbeweis nur äußerst knapp. Art. 20.3 statuiert lediglich die Möglichkeit der Zeugenanhörung durch das Schiedsgericht, wobei die Organisierung der Vernehmung ganz seinem Ermessen unterliegt.[81] In der ICC-Praxis sind dabei durchaus auch Fälle bekannt, in denen eine pre-trial deposition-ähnliche Verfahrensweise vom Schiedsgericht gebilligt wurde. In solchen Fällen wird die Aussage in der Regel vor einem Notar und den Parteianwälten geleistet, während die Schiedsrichter selbst nicht anwesend sind. Die Anwälte können sogar Fragen stellen. Die so gewonnene schriftlich festgehaltene Zeugenaussage ist sodann den Parteien und dem Schiedsgericht (im Falle der ICC auch dem Schiedsgerichtshof) zuzuleiten. Zwar enthält diese Verfahrensweise mehrere typische discovery-Momente, jedoch läuft die Befragung auch hier nicht ohne Wissen und Anordnung des Schiedsgerichts, d.h. es ist – mangels anderweitiger Parteivereinbarung – kein reiner Parteibetrieb US-amerikanischen Stils möglich.[82]

Dem einschlägigen *§ 27 DIS-SchO* ist auch nur die Möglichkeit der Zeugenvernehmung zu entnehmen. Detailregeln enthält diese die Sachverhaltsermittlung regelnde Vorschrift nur für den Sachverständigenbeweis.

Es gibt lediglich zwei Regelwerke, die sich bewusst auch den Details des Zeugenbeweises widmen. Es handelt sich dabei einerseits um die LCIA Rules, andererseits um die IBA Rules.

Die *LCIA Rules* enthalten eine detaillierte und die internationale Praxis vielfach widerspiegelnde Regelung. Diese Praxis ist besonders beim Zeugenbeweis grundsätzlich an angelsächsischen Grundvorstellungen orientiert. Einschlägig ist der auch Detailfragen klarstellende Art. 20 LCIA Rules.[83] In Schiedsverfah-

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[81] S. z.B. *ICC Case No. 6401/1998*, Clunet 125, 1058 (1998).

[82] Vgl. z.B. den procedural order in *ICC Case No. 7170/1993*, in: Dominique *Hascher* (ed.), Recueil des décisions de procédure dans l'arbitrage CCI 1993 – 1996, New York/Paris 1997, S. 55 f. Auch hier kam es zu dem deposition-ähnlichen Verfahren auf schiedsrichterliche Anordnung.

[83] Wegen ihres repräsentativen Charakters sei hier die ganze Vorschrift zitiert:
„1. Before any hearing, the Arbitral Tribunal may require any party to give notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject matter of that witness's testimony, its content and its relevance to the issues in the arbitration.
2. The Arbitral Tribunal may also determine the time, manner and form in which such materials should be exchanged between the parties and presented to the Arbitral Tribunal; and it has a discretion to allow, refuse, or limit the appearance of witnesses (whether witness of fact or expert witness).
3. Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or as a sworn affidavit.
4. Subject to Article 14.1 and 14.2, any party may request that a witness, on whose testimony another party seeks to rely, should attend for oral questioning at a hearing before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to produce the witness and the

ren beim Londoner Schiedsgericht kommen demnach mangels anderweitiger Parteivereinbarung gerade die typischen Züge eines US-amerikanisch geprägten Zeugenbeweises zur Anwendung. Unter den einheitlichen Zeugenbegriff fallen ausdrücklich auch Parteien und Sachverständige. Witness coaching und auszutauschende Aussageninhalte im Vorfeld der Verhandlung sind ebenso selbstverständlich für die LCIA Rules wie cross examinations in der Verhandlung. In die Reihe der angelsächsisch geprägten Schiedsordnungen gehören ferner aus der Sicht des Zeugenbeweises auch die *ICSID Rules* und die *WIPO Rules*. Artt. 34-36 ICSID Rules sowie Art. 54 WIPO Rules gehen von den gleichen Prinzipien wie die LCIA Rules aus und sollen daher hier nicht besonders behandelt werden. Zwar enthalten die *AAA Rules* keine entsprechende Regel, doch gehören sie aufgrund der etablierten Praxis[84] beim New Yorker Schiedsgericht ebenfalls in diese Reihe. Eine Besonderheit stellt noch Art. 74b WIPO Rules dar, der wegen der in WIPO-Verfahren oft auch für Zeugen einsehbaren technischen Geheimnisse die den Zeugen präsentierende Partei für die Verschwiegenheit des Letzteren verantwortlich macht.

Einen gewissen Erkenntniswert für die Kompromissuche haben schließlich die neuen *ALI/UNIDROIT Principles and Rules*. Sie sind zwar nicht in erster Linie für Schiedsverfahren entworfen worden, doch ihre rechtsvergleichende Grundlage und die ausdrückliche Empfehlung der Urheber auch für Schiedsverfahren machen ihre Einbeziehung in die vorliegende Untersuchung sinnvoll. Principle 16.4 empfiehlt für die Zeugenvernehmung zwar noch die Anwendung der jeweiligen lex fori[85] und erweckt damit den Eindruck, dass sich auf diesem Gebiet keine Kompromisslösung anbietet. Doch gehen die Urheber in den die Principles konkretisierenden Rules einen eindeutigen Schritt auf die angelsächsische Tradition zu. Rule 23 spricht von depositions, für die freilich die Ein-

witness fails to attend the oral hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony (or exclude the same altogether) as it considers appropriate in the circumstances of the case.

5. Any witness who gives oral evidence at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of his evidence.

6. Subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness.

7. Any individual intending to testify to the Arbitral Tribunal on any issue of fact or expertise shall be treated as a witness under these Rules notwithstanding that the individual is a party to the arbitration or was or is an officer, employee or shareholder of any party."

[84] Vgl. den Hinweis bei Michael *Bühler* – Carroll *Dorgan*, Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?, JIntArb 17(1), 3, 26 (2000) Fn. 95.

[85] „Eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum."

schränkung der gerichtlichen Anordnung und Kontrolle gilt. Für die Phase der Verhandlung bestimmt schließlich Rule 29.4 zwar zunächst die Befragungsreihenfolge Gericht-Parteien, doch führen die Urheber des rechtsvergleichend angelegten Regelwerks gleich anschließend in ihrem Kommentar zu Rule 29 aus, die typische common law-Befragungsmethode mit direct und cross examination durch die Anwälte sei am besten für eine erfolgreiche Zeugenvernehmung geeignet.[86]

Als Zwischenergebnis kann festgehalten werden, dass die Mehrheit der untersuchten Regelwerke oder doch zumindest die sich an sie anschließende Praxis der Schiedsgerichte hinsichtlich des Zeugenbeweises eine grundsätzliche Gewichtsverschiebung in Richtung angelsächsischer Tradition aufweisen.

4.3. Die internationale Praxis

Wie die in den vorausgehenden Erörterungen gewonnenen Erkenntnisse vermuten lassen, ist kein anderer Bereich der *lex mercatoria processualis* internationaler Schiedsgerichte so sehr von angelsächsischem Gedankengut geprägt, wie der des Zeugenbeweises. Dies manifestiert sich vor allem in der Gleichbehandlung der personalen Beweismittel, in der dialektischen Ausgestaltung der Befragung in der Verhandlung sowie in der weitgehenden Nutzbarmachung schriftlicher Zeugenaussagen zur Vorbereitung der Verhandlung. Nach der nahezu einhelligen Meinung im Schrifttum und unter Praktikern ist diese internationale Praxis realitätsgetreu in den *IBA Rules* festgeschrieben.[87] Daher bietet es sich an, die Hauptmerkmale des Zeugenbeweises, über die weitgehender internationaler Konsens besteht, am Beispiel des Art. 4 („Witnesses of Fact") sowie des für die mündliche Vernehmung einschlägigen Art. 8 IBA Rules („Evidentiary Hearing") zu veranschaulichen.

Die grundsätzliche Annäherung an US-amerikanische Vorstellungen kommt bereits in Art. 4.2. IBA Rules unmissverständlich zum Ausdruck, in dem die Differenzierung zwischen personalen Beweismitteln aufgehoben wird. Partei- und Zeugenbeweis werden gleichgestellt und am Beispiel der bereits referierten

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[86] Vgl. ALI/UNIDROIT Principles and Rules, R-29D, S. 139: „For a witness called by a party, the common law system of direct and supplemental examination by the parties is the most suitable for a thorough examination.The witness is first questioned by the lawyer of the party who called the witness, and then questioned by the lawyers for the adverse parties."

[87] Stellvertretend für viele vgl. nur Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3 (2000); Jens-Peter *Lachmann*, o. Fn. 61, Rn. 820 ff; Hilmar *Raeschke-Kessler*, o. Fn. 7, S. 155, 161; Michael *Straus*, The Practice of the Iran – U.S. Claims Tribunal in Receiving Evidence from Parties and from Experts, JIntArb 3(3), 57, 58 (1986).

Rule 601 F.R.Evid. einheitlich als Zeugenbeweis behandelt.[88] Es werden zwar hin und wieder Beispiele aus der schiedsrichterlichen Rechtsprechung bekannt, die am Beispiel der ZPO die Vernehmung von Parteien als Zeugen ausschließen, sie sind jedoch vereinzelt und reflektieren nicht die allgemeine Praxis sondern eher die an ihrer Heimatrechtsordnung haftende Denkweise einzelner Schiedsrichter.[89] Es ist weniger die deklarative Vorschrift an sich, die die Gleichstellung der personalen Beweismittel anordnet, sondern eher die sich daran anschließende Reihe von Konsequenzen wesentlich für die Ausgestaltung in internationalen Schiedsverfahren. Folgerichtig bestimmt nämlich die auf die Deklaration direkt folgende Vorschrift, dass Besprechungen zwischen Anwalt und Zeugen nichts entgegenstehen soll.[90] Eine solche Kontaktaufnahme zwischen Anwalt und Beweispersonen ist nicht nur möglich sondern sogar erwünscht, lassen sich doch hierdurch wertlose Zeugenaussagen und damit einhergehende Verfahrensverzögerungen von vornherein unterbinden.[91] Zudem braucht *witness preparation* nicht unbedingt zugleich *witness coaching* zu sein. Aber auch wenn die Grenze zwischen einfachem Vorbereitungsgespräch und bewusster Einübung der künftigen Aussage überschritten wird, ist dies bei weitem nicht mit so gravierenden Folgen verbunden wie im ordentlichen amerikanischen Prozess. Im Schiedsverfahren treten die Beweispersonen nicht der oft dem ersten Eindruck leichter zum Opfer fallenden jury, sondern in der Regel erfahrenen Juristen gegenüber, für die die Absicht des Anwalts in der Aussage schneller durchschimmert. Deswegen kann sich in Schiedsverfahren eine im US-amerikanischen Sinne durchgeführte witness coaching schnell auch als kontraproduktiv erweisen. Sie kann insbesondere nicht nur die Glaubwürdigkeit des Zeugen erschüttern sondern auch die Kooperationsbereitschaft des

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[88] „Any person may present evidence as a witness, including a party or a party's officer, employee or other representative." Nach Axel H. *Baum*, o. Fn. 79, S. 21, 25 ist dieser Satz „... a current manifestation of Lex Arbitrationis...".

[89] Für ein solches Beispiel vgl. *ICC Case No. 7319/1992*, in: Dominique *Hascher* (ed.), Recueil des décisions de procédure dans l'arbitrage CCI 1993 – 1996, New York/Paris 1997, S. 96. Dazu Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3, 8 ff. (2000).

[90] Nach Art. 4.3: „It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses."

[91] Für eine Beschreibung der Praxis von witness coaching in internationalen Schiedsverfahren vgl. David P. *Roney*, Effective Witness Preparation for International Commercial Arbitration: A Practice Guide for Counsel, JIntArb 20(5), 429 (2003). Zustimmend auch Markus *Wirth*, Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden, SchiedsVZ 2003, 9, 13 f. und Hans Ulrich *Walder-Bohner*, Zeugen vor Schiedsgericht, in: Recueil de Travaux Suisses, S. 213, 214; Georg *von Segesser*, Witness Preparation in International Commercial Arbitration, 20(2) ASA Bull. 222 (2002); 19(4) Matthias *Scherer*, Beweisfragen bei Korruptionsfällen vor internationalen Schiedsgerichten, ASA Bulletin 684 (2001). In bezug auf die IBA Rules vgl. Jean-François *Poudret* – Sébastien *Besson*, o. Fn. 62, Rn. 660.

Schiedsgerichts mit dem betreffenden Anwalt beeinträchtigen.[92] Wie jedoch noch zu zeigen sein wird, ist die Präsentierung der Worte des Anwalts im Gewande von Zeugenaussagen wegen der verbreiteten Nutzung schriftlicher Zeugenaussagen letztlich nicht auszuschließen. In diesem Fall helfen nur die Kontrollmechanismen, die schon im amerikanischen Zivilprozess die Berücksichtigung bzw. die Entlarvung von Interessenlagen ermöglichen: Die freie Beweiswürdigung und das großzügig zugelassene Kreuzverhör auch solcher Zeugen, die sich schon schriftlich geäußert zu haben vorgeben.

Zwar bestimmt die Eingangsvorschrift Art. 4.1 IBA Rules, dass jede Partei innerhalb der vom Schiedsgericht festgesetzten Frist ihre Zeugen und den Vernehmungsgegenstand bezeichnen soll. Doch im Einklang mit dem „abgemilderten Untersuchungsgrundsatz" braucht sich das Schiedsgericht nicht auf die Zeugenbeweisangebote der Parteien zu beschränken. Vielmehr kann es gemäß Art. 4.11. a.E. IBA Rules einen Zeugenbeweis auch ohne diesbezüglichen Antrag und Zeugenbenennung durch die Partei anordnen („.... including one whose testimony has not yet been offered."). Eine amtswegige Beweiserhebung kann zwar auch in einem von der Verhandlungsmaxime beherrschten Verfahren erfolgen[93], hiervon macht das deutsche Recht jedoch gerade beim Zeugenbeweis eine Ausnahme. Auch im Lichte der erhöhten Entscheidungsverantwortung des Schiedsgerichts ist kein Grund zu ersehen, warum an dieser Einschränkung des deutschen Rechts festzuhalten wäre.

Die IBA Rules machen keine eindeutigen Zugeständnisse an das US-amerikanische System hinsichtlich der Vorverhandlungsphase. Insbesondere sind keine depositions im Sinne von Rule 30 F.R.C.P. vorgesehen. Was dieses frühe Stadium des Verfahrens angeht, kann Art. 1.3 der Präambel entnommen werden, dass die IBA Rules entgegen der amerikanischen Auffassung hier die Hauptrolle dem Schiedsgericht und nicht den Anwälten zudenken. Die genannte Vorschrift umfasst auch die Möglichkeit des Schiedsgerichts, im Rahmen eines pre-trial conference-ähnlichen Treffens mit den Parteien die möglichen Zeugen zu identifizieren. Einen Schritt weiter kann das Schiedsgericht auch gehen, indem es sich anschließend in einem besonderen Termin nur mit den zu ladenden Zeugen trifft. Solche sogenannten *witness conferences* sind ein effektives Mittel zur zeitigen Klärung von Streitpunkten und zur „Auslese" tatsächlich anzuhörender Zeugen.[94] All diese Aufgaben bzw. Befugnisse kommen in der internationalen Schiedspraxis den Schiedsrichtern und nicht den Parteianwälten zu. Depositions in Anwaltsregie und ohne schiedsgerichtliche Kontrolle bilden

[92] So auch Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3, 20 (2000).

[93] So bei den Beweismitteln der ZPO, jedoch gerade mit Ausnahme des Zeugenbeweises (§§ 373, 273 Abs. 2 Nr.4. ZPO).

[94] Vgl. dazu Wolfgang *Peter*, Witness „Conferencing", 18 ArbInt 47 (2002) ferner m. w. Nachw. Jean-François *Poudret* – Sébastien *Besson*, o. Fn. 62, Rn. 658.

daher keinen Bestandteil des gewöhnlichen Ablaufs der Vorverhandlungsphase.[95] Ihre Funktionen übernehmen vielmehr die noch zu behandelnden schriftlichen Zeugenaussagen.

Für die Phase der Verhandlung schrieben die IBA Rules in Art. 8 die sich weitgehend am US-amerikanischen Beispiel der dialektischen Vernehmungsmethode orientierende internationale Schiedsverfahrenspraxis fest. Zwar obliegt nach Art. 8.1 die Kontrolle über den Ablauf der mündlichen Verhandlung grundsätzlich dem Schiedsgericht[96], doch sieht für die Zeugenvernehmung gleich anschließend Art. 8.2 praktisch die Durchführung eines unverfälschten Kreuzverhörs vor. Die amerikanische Ausrichtung widerspiegelt sich bereits in der Wortwahl der Vorschrift sowie in der dort vorgesehenen Vernehmungsreihenfolge.[97] In der internationalen Schiedspraxis sind cross examinations mittlerweile eine Selbstverständlichkeit.[98] Das trifft sogar nicht nur auf rechtskreisübergreifende, „gemischte" Verfahren zu, sondern auch auf solche, die mit rein kontinentaleuropäischer Beteiligung ablaufen.[99] Letztere von Praktikern vielfach bestätigte Tatsache spricht dafür, dass die „schleichende Rechtsvergleichung" die amerikanische Methode als die effektivere ansieht.[100] Die Nachteile

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[95] Vereinzelt sind jedoch pre-hearing depositions in ICC-Verfahren bekannt geworden. Vgl. Laurence W. *Craig* – William W. *Park* – Jan *Paulsson*, International Chamber of Commerce Arbitration, 3d Edition, New York 2000, § 26.02, S. 457 f. und Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3, 12 (2000).

[96] Merkwürdigerweise manifestiert sich das auch in ebenfalls in der Eingangsvorschrift aufzufindenden evidence law-ähnlichen Vorschriften, wie etwa der Ausschlussmöglichkeit von *leading questions*.

[97] „The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and then by the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning. The Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other. The Arbitral Tribunal may ask questions to a witness at any time."

[98] Vgl. Axel H. *Baum*, o. Fn. 79, S. 21, 25; Roberto *Ceccon*, UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence – A New Approach to International Arbitration, JIntArb 14(2), 68, 75 (1997).

[99] Die Durchführung von cross examinations ist in der modernen internationalen Schiedsgerichtsbarkeit auch ohne angelsächsische Beteiligung als etablierte Praxis anzusehen. Vgl. z.B. Peter R. *Griffin*, Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings JIntArb 17(2), 19, 26 f. (2000); Jean-François *Poudret* – Sébastien *Besson*, o. Fn. 62, Rn. 657.

[100] Die rasante Verbreitung des Kreuzverhörs in Schiedsverfahren ist eher auf diese Einsicht, als auf das schlechthin angenommene Übergewicht/Geltungsanspruch des amerikanischen Rechts zurückzuführen. Letzteres will trotzdem William W. *Park*, 63 Tulane Law Review 647, 698

des angelsächsischen Urbildes (Theatralik, eingeübte Aussagen) spielen im schiedsverfahrensrechtlichen Kontext in Anbetracht des Fehlens der Laienbeteiligung und der durchgehenden schiedsrichterlichen Kontrolle nur eine verschwindend geringe Rolle.

Funktional wandelt sich das Kreuzverhör im Schiedsverfahren. Zum einen steht diese Wandlung im Zusammenhang mit der verbreiteten Nutzung von detaillierten schriftlichen Zeugenaussagen. Sind solche präsentiert worden, so bezieht sich das cross examination oft nicht mehr in erster Linie auf den Inhalt, sondern nur noch auf die Nachprüfung der Glaubwürdigkeit der Zeugen, wenn sie überhaupt noch geladen werden.[101] Zum anderen ist der Funktionswandel durch das Fehlen von pre-trial (pre-arbitral hearing) depositions bedingt. Wie gesehen läuft die dialektische Vernehmung der Beweispersonen in einem typischen US-amerikanischen Zivilverfahren in zwei aufeinanderfolgenden Stufen, nämlich einmal vor und einmal in der Verhandlung ab. Da in der internationalen Schiedspraxis und so entsprechend auch in den IBA Rules das stilprägende amerikanische Element des vor der Verhandlung stattfindenden, parteiinitiierten und keiner richterlichen Aufsicht unterworfenen Verhörs entfällt, kommt der mündlichen Verhandlung doppelte Bedeutung zu. Zumindest für die Anwälte übernimmt so das Kreuzverhör in der Verhandlung die Aufgabe von depositions.[102] Dass dies im Beisein der Schiedsrichter geschieht, ist zumeist im Sinne der europäischen Beteiligten.

Ein letzter Aspekt im Zusammenhang mit der Durchführung der mündlichen Zeugenvernehmung zeigt auch die Notwendigkeit der verstärkten schiedsrichterlichen Kontrolle. Auch wenn das von den Anwälten beherrschte Kreuzverhör längst zur etablierten *lex arbitrationis* gehört, kann durch seine unkontrollierte Zulassung die Waffengleichheit zwischen den Parteien gestört werden. Der aus dem angelsächsischen Rechtskreis kommende Parteivertreter wird in der Regel viel geübter sein, als sein europäischer Kollege. Daher muss das Schiedsgericht ständig darauf achten, wann sein gestaltendes Eingreifen in die Vernehmung gefragt ist, damit eine sich auch inhaltlich auswirkende Ungleichbehandlung der Parteien bzw. ihrer Vertreter vermieden werden kann.[103]

(1989) gelten lassen: „The right to cross-examine witnesses (on which the continental and the Anglo-American approaches diverge), is deemed an essential element to a fair hearing, and thus prevents arbitrators from adopting an entirely inquisitorial system."

[101] Ebenso Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3, 26 (2000).

[102] Ebenso Mark J. *Astarita*, Standards for Resolving Discovery Disputes in Arbitration, August PLI 813, 825 (2002).

[103] Ebenso Georgios *Petrochilos*, Procedural Law in International Arbitration, Oxford 2004, Rn. 5.121.

Abschließend ist noch auf das Institut des *witness statement* in Artt. 4.4 – 4.9 IBA Rules hinzuweisen, das bereits bis dahin in der Praxis Wurzeln gefasst hat.[104] Eine schriftlich festgehaltene Aussage kann zweierlei Funktionen erfüllen. Sie kann einerseits eine Alternative zur mündlichen Vernehmung darstellen, andererseits sich als für die Vorbereitung der mündlichen Befragung sehr nützlich erweisen.

Die Parteien können ihren Zeugenbeweis gleich durch Einreichung von schriftlichen Zeugenaussagen antreten, aber auch das Schiedsgericht kann nach Art. 4.4 die Präsentierung von written witness statements innerhalb einer von ihm festgesetzten Frist anordnen. Es wird dies in aller Regel tun, wenn mit dem persönlichen Erscheinen des Zeugen wegen Unverhältnismäßigkeit nicht zu rechnen ist. In internationalen Verfahren kommt daher gerade wegen der großen geografischen Entfernungen und des womöglich unverhältnismäßigen zeitlichen sowie kostenmäßigen Aufwands häufig zu einer solchen Anordnung.

Durch die Einreichung einer schriftlichen Zeugenaussage erübrigt sich zwar das Erscheinen des Zeugen in der mündlichen Verhandlung grundsätzlich nicht.[105] Kommt es anschließend zu einer persönlichen Vernehmung, hat die schriftliche Erklärung ihren Sinn dadurch aber nicht verloren. Sie kann hervorragend zur Vorbereitung der mündlichen Verhandlung und zu der vorläufigen Einschätzung der Relevanz und der Verlässlichkeit des Zeugenbeweises beitragen.[106] Praktiker heben hervor, dass durch den regelmäßigen Einsatz schriftlicher Aussagen zu Vorbereitungszwecken sich auch die häufige unangenehme Überraschung der Wertlosigkeit einer Zeugenaussage, die sich sonst erst in der Verhandlung herausstellen würde, vermeiden lässt.[107] Die Parteien können nach US-amerikanischem Vorbild auch vereinbaren, dass die schriftliche Erklärung nicht berücksichtigt werden darf, wenn sich ein Zeuge weigert, anschließend mündlich auszusagen.[108] Einen weiteren Vereinfachungs- und Beschleunigungseffekt hat jene Vereinbarung der Parteien, die schriftlichen Zeugenaussagen zunächst ausreichen zu lassen und sie als primäre Aussage des Zeugen zuzulassen (written direct testimony).[109] Eine solche Vereinbarungsmöglichkeit

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[104] Vgl. Hilmar *Raeschke-Kessler*, o. Fn. 7, S. 155, 161.

[105] Vgl. Art. 8.2 IBA Rules.

[106] Vgl. Emmanuel *Gaillard* – John *Savage* (eds.), o. Fn. 61, Rn. 1284 sowie die dort zitierte Entscheidung *ICC Case No. 7314/1996*, Clunet 123, 1045 (1996); Michael E. *Schneider*, Les témoins dans la procédure arbitrale, ASA Bulletin 1993, 302 ff. und 568 ff.

[107] So z.B. Markus *Wirth*, o. Fn. 91, SchiedsVZ 2003, 9, 13; Hilmar *Raeschke-Kessler*, o. Fn. 7, S. 155, 162.

[108] So der Hinweis bei Emmanuel *Gaillard* – John *Savage* (eds.), o. Fn. 61, Rn. 1284.

[109] Wegen der Mittelbarkeit grundsätzlich dagegen z.B. James M. *Arnott*, Presenting Evidence and Arguments in an International Arbitration, in: Dennis *Campbell* – Susan *Meek* (eds.), The Arbitration Process, The Comparative Law Yearbook of International Business, Special Issue 2001, The Hague/London/Boston 2002, S. 189, 204 f. sowie auch Hans Ulrich *Walder-Bohner*, o. Fn. 91, in: Recueil de Travaux Suisses, S. 213. Aus verfahrensökonomischen Gründen generell dafür Thomas J. *Tallerico* – Adam J. *Behrendt*, The Use of Bifurcation and

sieht Art. 8.3 IBA Rules vor.[110] Dann kommt es zu einer mündlichen Vernehmung nur ausnahmsweise bei Klärungsbedarf und entsprechendem Antrag einer Partei.[111] Eine solche, auch nach Art. 4.7 IBA Rules grundsätzlich mögliche Vereinbarung der Parteien bindet aber keineswegs auch inhaltlich das Schiedsgericht. Den Inhalt der Aussage kann und soll das Schiedsgericht dann frei würdigen.[112]

Die einzige problematische Vorschrift unter den Regeln betreffend schriftliche Erklärungen stellt nach hier vertretener Ansicht Art. 4.8 IBA Rules dar.[113] In der dort formulierten harten Sanktion scheint es interessengerechter zu sein, das Regel-Ausnahme-Verhältnis umzukehren und die völlige Nichtbeachtung der schriftlichen Erklärung bei Nichterscheinen des Zeugen nur ausnahmsweise eingreifen zu lassen. Die Parteien können nicht immer das Erscheinen des Zeugen kontrollieren, deswegen könnte eine starre und undifferenzierte Handhabung dieser Regel zu ungerechten Ergebnissen führen.[114]

Am Ende der Behandlung der schriftlichen Zeugenaussagen kann festgehalten werden, dass sich der Zeugenbeweis vor allem in internationalen Schiedsverfahren, in denen Zeit- und Kostengründe dies nahelegen, tendenziell zunehmend zu einem schriftlichen Beweismittel wandelt.[115] Written witness statements sind insbesondere auch gut dazu geeignet, in Schiedsverfahren grundsätzlich unzulässige bzw. ungebräuchliche depositions funktional zu ersetzen[116], weswegen sie eine gute Kompromissgrundlage für US-amerikanische Verfahrensbeteiligte bieten.

Direct Testimony Witness Statements in International Commercial Arbitration Proceedings, JIntArb 20(3), 295 (2003).

[110] „The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony."

[111] Für eine mögliche Gestaltung der Parteivereinbarung betreffend schriftliche Zeugenaussagen vgl. das Beispiel bei Klaus Peter *Berger*, o. Fn. 78, S. 304 f.

[112] Dies stellt Art. 4.9 klar: „If the Parties agree that a witness who has submitted a Witness Statement does not need to appear for testimony at an Evidentiary Hearing, such an agreement shall not be considered to reflect an agreement as to the correctness of the content of the Witness Statement."

[113] „If a witness who has submitted a Witness Statement does not appear without a valid reason for testimony at an Evidentiary Hearing, except by agreement of the Parties, the Arbitral Tribunal shall disregard that Witness Statement unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise."

[114] Daher von der Anwendung dieser Vorschrift abratend Jens-Peter *Lachmann*, o. Fn. 61, Rn. 828.

[115] Vgl. ebenso Alan *Redfern* – Martin *Hunter*, o. Fn. 76, Rn. 6-78; Klaus Peter *Berger*, o. Fn. 78, S. 294; Gerhard *Wagner*, in: Frank-Bernd *Weigand* (ed.), o. Fn. 67, Rn. 232 f; Torsten *Lörcher*, o. Fn. 79, S. 275; Gino *Lörcher* – Heike *Lörcher* – Torsten *Lörcher*, Das Schiedsverfahren – national/international – nach deutschem Recht, 2. Auflage, Heidelberg 2001, Rn. 267 f; Gary B. *Born*, o. Fn. 73, S. 487 f; Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3, 13 (2000).

[116] Ebenso Axel H. *Baum*, o. Fn. 79, S. 21, 26.

Zusammenfassend ist festzuhalten, dass auf dem Gebiet des Zeugenbeweises eine deutliche Gewichtsverschiebung zugunsten der angelsächsischen Methode der parteibeherrschten Vernehmung zu verzeichnen ist. Daher kann und soll die Titelwahl der vorliegenden Untersuchung („witness evidence") gewissermaßen symbolisch verstanden werden. Diese Gewichtsverschiebung steht jedoch wegen der bestimmenden Rolle des Schiedsgerichts vor der Verhandlung sowie wegen der durchgehenden Kontrolle der Befragung durch das Schiedsgericht in der Verhandlung auch kontinentalen Vorstellungen nicht entgegen und bewegt sich eindeutig noch im Rahmen der Verfahrensgestaltungsfreiheit der Parteien bzw. der zulässigen Ausübung des schiedsrichterlichen Verfahrensermessens auch nach deutschem Recht (§ 1042 III, IV ZPO).[117] Bei der üblichen Durchführung von cross examinations ist jedoch besonders auf die Einhaltung des Gebots der Gleichbehandlung der Parteien zu achten. Die in der Praxis des Kreuzverhörs ungeübte kontinentale Partei könnte sonst benachteiligt und damit der Bestand des Schiedsspruchs gefährdet werden.[118] Vollends ist ein Kompromiss zwischen den Rechtskreisen dadurch gewährleistet, dass parteiinitiierte protokollierte Befragungen und Kreuzverhöre in der Vorverhandlungsphase, wie sie insbesondere im US-amerikanischen Recht üblich sind, nirgends vorgesehen und jedenfalls nicht erzwingbar sind. Mit anderen Worten: Pre-trial (pre-arbitral hearing) depositions werden in der Regel nicht durchgeführt. Etwas anderes gilt nur, wenn die Parteien sich ausnahmsweise über die wechselseitige Durchführung von depositions ausdrücklich einigen.[119] Solche Fälle dürften allerdings – auch wenn dies in Publikationen nicht sichtbar wird – in Anbetracht der amerikanisch orientierten Internationalisierung des Anwaltsberufs immer häufiger vorkommen.

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[117] Vgl. Gerhard *Wagner*, in: Frank-Bernd *Weigand* (ed.), o. Fn. 67, Rn. 237.

[118] Dies betont auch Justin *Thorens*, L'arbitre international au point de rencontre des traditions du droit civil et de la common law – Deux problèmes liés, l'un à la communication des pièces et l'autre à l'audition des témoins, in: Christian *Dominicé* (ed.), Études de droit international en l'honneur de Pierre Lalive, Bâle/Francfort-sur-le-Main 1993, 693, 696.

[119] Über entsprechende ICC-Praxis berichten Laurence W. *Craig* – William W. *Park* – Jan *Paulsson*, o. Fn. 95, § 26.02, S. 457 f. und Michael *Bühler* – Carroll *Dorgan*, o. Fn. 84, JIntArb 17(1), 3, 12 (2000). Einschränkend Gary B. *Born*, o. Fn. 73, S. 487.

Abkürzungen:

AAA	American Arbitration Association
ABA	American Bar Association
A.D.	Appellate Division
AK-ZPO/(Bearbeiter)	Alternativkommentar zur Zivilprozessordnung, Herausgeber: Rudolf Wassermann, Neuwied 1987
ALI	American Law Institute
ArbInt	Arbitration International
ASA Bull.	Bulletin d'Association Suisse de l'Arbitrage
BGH	Bundesgerichtshof
Clunet	Journal du Droit International fondé par Édouard Clunet
D.	District
Diss.	Dissertation
DRiZ	Deutsche Richterzeitung
EGMR	Europäischer Gerichtshof für Menschenrechte
EMRK	Europäische Menschenrechtskonvention
F.	Federal Reporter
FAA	Federal Arbitration Act
Fn.	Fußnote
F.R.C.P.	Federal Rules of Civil Procedure
F.R.Evid.	Federal Rules of Evidence
FS	Festschrift
F.Supp.	Federal Supplement
HBÜ	Haager Übereinkommen vom 18. März 1970 über die Beweisaufnahme im Ausland in Zivil oder Handelssachen
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Center for the Settlement of Investment Disputes

JIntArb	Journal of International Arbitration
LCIA	London Court of International Arbitration
L.R./L.Rev.	Law Review
McCormick, On Evidence	Charles Tilford McCormick – John William Strong – Kenneth S. John: On Evidence, 5th Edition, St. Paul, Minn. 1999
MünchKomm	Münchener Kommentar zur Zivilprozessordnung, herausgegeben von Gerhard Lüke und Peter Wax, 2. Auflage, München 2000
NCPC	Nouveau Code de Procédure Civile
NJW	Neue Juristische Wochenschrift
OLG	Oberlandesgericht
PLI	Practising Law Institute, Corporate Law and Practice Course Handbook Series
Rn.	Randnummer
RR	Rechtsprechungsreport
o.	oben
S.	Seite
SchiedsVZ	Zeitschrift für Schiedsverfahren
Sec.	Section
Thomas/Putzo/(Bearbeiter)	Zivilprozessordnung, Kommentar von Heinz Thomas, Hans Putzo, Klaus Reichold und Rainer Hüßtege, 24. Auflage, München 2002
U.S.	United States Supreme Court Reports
Vgl./vgl.	vergleiche
WM	Zeitschrift für Wirtschafts und Bankrecht, Wertpapiermitteilungen
ZEuP	Zeitschrift für Europäisches Privatrecht
ZPO	Zivilprozessordnung
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozess

RESÜMEE

„Witness Evidence" in privaten Schiedsverfahren mit europäischer und US-amerikanischer Beteiligung

ISTVÁN VARGA

Wie es schon im Titel der Studie symbolisch zum Ausdruck kommt, zeigt der weltweite Trend in der internationalen Schiedsgerichtsbarkeit eine deutliche Gewichtsverschiebung in Richtung der Verwendung von angelsächsischen verfahrensrechtlichen Mitteln. Diese Tendenz wird in der vorliegenden Studie am Beispiel des Zeugenbeweises veranschaulicht, der gemäß den praktischen Erfahrungen immer mehr verfahrensrechtliche Mittel aus dem common law übernimmt. Es reicht hierbei vor allem nur daran zu denken, dass die Einübung der Zeugenaussagen nach dem amerikanischen Beispiel und dann in der Verhandlung die für die angelsächsische Rechtsfamilie charakteristische cross-examination eine wichtige Rolle in internationalen Schiedsverfahren spielen, in denen eine der Parteien, oder ihre Rechtsanwälte oder einer der Schiedsrichter aus der angelsächsischen Rechtsfamilie kommt. Während für die Letzteren die bereits erwähnten Verfahrensmittel selbstverständliche Bestandteile des Zivilprozesses – und dadurch auch des Schiedsverfahrens – sind, kann die Anwendung des Zeugenbeweises angelsächsischer Prägung für die eventuell ihnen gegenüber stehende Partei oder für ihren Anwalt mangels praktischer Erfahrungen einen Nachteil im Verfahren bedeuten. Das Problem ist auch deshalb sehr erheblich, weil die Verletzung der Waffengleichheit der Parteien im Prozess die staatliche Anerkennung und auch die Vollstreckung des Schiedsspruchs gefährden kann. Aus diesen Gründen ist es wichtig, die Unterschiede zwischen dem europäischen und dem für das angelsächsische System typischen amerikanischen Zeugenbeweis detailliert herauszuarbeiten, und danach solche Regeln in den Schiedsgerichtsverfahren anzuwenden, die verfahrensrechtlich keine der Parteien benachteiligen. Die Studie unternimmt den Versuch, diese Unterschiede zu identifizieren und – hierauf aufbauend – verfahrensrechtliche Lösungen für die Zwecke der internationalen Handelsschiedsgerichtsbarkeit herauszuarbeiten, die zum Befolgen empfohlen werden können.

SUMMARY

Witness Evidence in Commercial Arbitration Proceedings Involving European and American Parties

ISTVÁN VARGA

As indicated by the title, elements of common law civil procedure increasingly appear in international arbitration cases, where either one of the parties, their lawyers or any of the arbitrators have common law background. The essay describes witness evidence to illustrate a component of common law civil procedure. Often the witness testimony is rehearsed in advance, and during the trial the witnesses are subjected to cross examination. For participants originating from common law countries, such procedural devices are customary components of civil procedure, including arbitration. However, parties, lawyers etc. from civil law countries have mostly no experience concerning witness evidence, what can cause considerable procedural disadvantage for them. This is a serious issue. If the procedural equal treatment of the parties is not guaranteed, recognition and enforcement of the arbitral award might be jeopardized. That is why it is of top priority to take stock of the differences between the procedure of witness evidence in civil and common law countries. Once the differences are identified, it will be possible to instruct international arbitration courts to apply such rules of procedure that are not disadvantageous for either party. The present essay makes an attempt to enumerate the differences between the two traditional approaches and puts forward recommendations for arbitration courts that hear international cases.

DIE EINBEZIEHUNG DER EUROPÄISCHEN UNION IN DAS WELTHANDELSRECHT UND IHRE MITWIRKUNG IN DER WTO

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„Aller Handel ist Welthandel. Aller Welthandel ist Freihandel"
(Sir Walter Raleigh)

I. Einführung und Problemstellung

Die Gemeinschaften sind im ÜWTO zweimal explizit genannt: und zwar zum ersten Mal das Entscheidungstreffen – decision-making (Art. IX Abs.1) –, und zum zweiten Mal die Mitgliedschaft betreffend – original membership (Art. XI. Abs. 1). Diese zwei harmlosen Sätze waren und sind Quellen einer Reihe von institutionellen und materiellrechtlichen Komplikationen des Europa- und Völkerrechts.

Gemäß Art. XI Abs. 1 der ÜWTO sind die Europäischen Gemeinschaften neben ihren Mitgliedstaaten ursprüngliches Mitglied der WTO.[1] Die WTO ist eine internationale Organisation (Art. VIII ÜWTO)[2] und gemäß Art. VII Abs. 1 ÜWTO bzw. gegenüber der früheren vertraglichen Einrichtung des GATT 1947 ein Völkerrechtssubjekt. Die Mitgliedschaft in einer internationalen Organisation ist anderen internationalen Organisationen – in diesem Sinne auch der EU – nicht ausgeschlossen,[3] obwohl sie (1) die Völkerrechtsfähigkeit der teilnehmenden Organisation, (2) die die Beteiligung umfassende völkerrechtliche Handlungsfähigkeit, sowie (3) den Akt des Erwerbs benötigt. Dies alles folgt aus einem einfachen Zusammenhang: kein Mitgliedstatus ohne Vertragspartnerschaft.[4]

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1 Obwohl die Gemeinschaften früher am GATT 1947 formal nicht beteiligt waren, haben sie einen de facto Mitgliedstatus genossen. Siehe Weiß – Herrmann, Rn. 114 ff.; Prieß – Berrsich, A. III. Rn. 64; Jansen, EuZW 1994, 336; Oppermann, RIW 1995, 922.

2 Dazu Weiß – Hermann, Rn. 154; Oppermann, RIW 1995, 921 f.

3 Klein, in Vitzthum Rn. 13; Schon ganz früh vom EuGH bestätigt im Gutachten 1/76. Dazu Pescatore, CMLR 1977, 631 f.

4 Klein, in Vitzthum Rn. 61 ff.

Die Ausübung der aus der Mitgliedschaft folgenden Rechte, besonders die Teilnahme an der Entscheidungsfindung setzt ebenso die Beantwortung der oben erwähnten Fragen voraus. Ein Unterschied ist doch zu bemerken, und zwar die ständige Neufassung der Kompetenzen der EG auf dem Gebiete der gemeinsamen Handelspolitik in den Verträgen von Amsterdam, Nizza und im neuen Verfassungsvertrag von Rom.[5]

Der skizzierte völker- und europarechtliche Rahmen bietet einen Gang der Darstellung mit einem naturgemäßen Schwerpunkt der Problematik der Außenkompetenzen der EG.

II. Die Völkerrechtsfähigkeit

Die internationalen Organisationen sind Völkerrechtssubjekte, wenn die Entstehung einer solchen Eigenschaft von ihren Gründungsmitgliedern gewollt war, aber nur mit Restriktionen. Ihre Völkerrechtsfähigkeit dehnt sich nur auf die gewollte Breite und Tiefe aus.[6] Das Vorliegen einer völkerrechtlichen Rechtsfähigkeit ist den Europäischen Gemeinschaften – gemäß Art. 281 EGV, Art. 184 EAGV – eindeutig zuzuweisen.[7] Die völkerrechtliche Rechtsfähigkeit wurde von der Völkerrechtsgemeinschaft anerkannt, und damit wirkt sie in den Außenverhältnissen der Gemeinschaften.[8]

Eine korrespondierende Rechtsfähigkeit der Europäischen Union ist wohl umstritten,[9] was mit Rücksicht auf den Mangel der vertraglichen Regelung verständlich ist. Aufgrund des historischen Willens der Gründerstaaten ist allerdings eine Rechtsfähigkeit eher abzulehnen. Jedoch scheint die Union eigene

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5 Mit der französischen Ablehnung des EVV am 29. Mai 2005, und mit der holländischen am 1. Juni ist das Verfassungsprojekt offensichtlich gescheitert. Alle meine Referenzen zum EVV sind deshalb eher von theoretischer Natur.

6 Klein, in Vitzthum Rn. 93 ff.; Shaw, S. 792.

7 Das Ziel der genannten Artikel, ein Völkerrechtssubjekt zu schaffen, folgt aus Art. 282 EGV und Art. 185 EAGV, die den Gemeinschaften je eine privatrechtliche Rechtsfähigkeit fundieren, Müller-Graff, in Dauses, A. I Rn. 56.; Simma/Vedder, in Grabitz/Hilf Art. 281 EGV Rn. 2 ff.; Pescatore, CMLR 1979, 641 ff.; ferner m. w. N. Lorenz, S. 61.

8 Oppermann, Rn. 157 f.; Herdegen, Rn. 73; Müller-Graff, in Dauses, A. I Rn. 57.; Arnold, in Dauses K. I 46; Zur Anerkennung der EG von den RGW-Staaten Simma-Vedder, in Grabitz/Hilf Art. 281 Rn. 4.

9 Streinz/Ohler/Herrmann, S. 87. Zur Befürwortung einer Rechtspersönlichkeit: v. Bogdandy und Nettesheim, NJW 1995, 2324 ff. Eine ähnliche körperschaftliche Argumentation auch bei Schroeder, in: v. Bogdandy, 388 ff.
Vgl. die Kritik der soziologischen, „den Bereich der juristischen Dogmatik verlassenden" Betrachtungsweise, Pechtsein, EuR 1996, 137 ff. vgl. ferner Dörr, NJW 1995, 3162 ff. Die Schlussfolgerung von v. Bogdandy und Nettesheim ist m.E. weiterhin aufgrund des Art. 46 f. EUV abzulehnen.

Kompetenzen zu haben, die die Grundlagen einer Konstruktion der Rechtsfähigkeit bilden könnten.[10] Der Amsterdamer Vertrag stärkte eine Tendenz zur Anerkennung der Rechtspersönlichkeit der EU mit der Einführung der Artikel 24 und 38 EUV, welche Tendenz – Hand in Hand mit den dogmatischen Unklarheiten – durch die Vertragspraxis der EU intensiviert wurde.[11] Das einschlägige Argument gegen die Anerkennung der Rechtsfähigkeit der EU ist jedoch der neue EVV selbst, der eine solche Rechtsfähigkeit konstruiert.[12] Dies wäre nicht nötig, wenn die EU schon eine hätte.

Die völkerrechtliche Rechtsfähigkeit ist nicht eine allumfassende, da die Gemeinschaften nicht originäre, sondern künstlich geschaffene Subjekte des Völkerrechts sind.[13] Ihre Rechtsfähigkeit ist im Prinzip vielmehr nur auf die Gebiete und Handlungsformen begrenzt, die durch die Gründungsakte den einzelnen Gemeinschaften übergeben worden sind, sie unterliegt also – ebenso wie im Bereiche der Innenkompetenzen – dem Grundsatz der begrenzten Einzelermächtigung,[14] und steht der den Staaten vorbehaltenen Kompetenz-Kompetenz gegenüber.[15]

III. Die Vertragsabschlußfähigkeit – Außenkompetenz der EG

Die Vertragsabschlußfähigkeit, d.h. „die Fähigkeit mit dritten Staaten oder internationalen Organisationen vertragliche Bindungen völkerrechtlicher Natur einzugehen",[16] wie sie aus der mitgliedstaatlichen Ermächtigung folgt, findet ihre Grenzen in dem vertraglichen Gesamtwerk. Eine Handlungskompetenz der Gemeinschaften unterliegt dem Prinzip der „compétence d'attribution", sie folgt weder aus Art. 281 noch aus Art. 300,[17] sondern sie muss in den speziellen Politikbereichen verankert sein, d.h. z.B. eine bloße inhaltliche Übereinstimmung der Finalitäten der Weltwirtschaftsordnung und der europäischen Integrationsidee[18] genügt nicht.

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[10] Als Befürworter einer solchen Konstruktion Schroeder, in: v. Bogdandy, 386 ff.

[11] Vgl. Meinhard – Pache, NJW 1998, 709; Hartley, S. 217; Streinz/Ohler/Herrmann, S. 87; Schroeder, in: v. Bogdandy, 390 ff.

[12] Vgl. Art. I-7. EVV, dazu Streinz/Ohler/Herrmann, S. 33; Vgl. ferner den Schlussbericht des Vorsitzenden der Gruppe III „Rechtspersönlichkeit" für die Mitglieder des Konvents CONV 305/02.

[13] Klein, in Vitzthum Rn. 95; Shaw, S. 792.

[14] Vgl. Art. 5 EUV, Art. 5 I, 202, 249 EGV; Art. 2, 3 101, 115 EAGV; Vgl. ferner Artt. 5, 8, 26 EGKSV. Vgl. aus der Literatur statt vieler Oppermann, Rn. 513 ff., Stettner, in Dauses A. IV 9 ff., Nicholaysen, S. 293. Last but not least das Maastricht-Urteil, BVerfG NJW 1993, 3047, 3052 ff.

[15] Umfassend Dörr, EuZW 1996, 40.

[16] Gilsdorf, EuR 1996, 145.

[17] Allg. Shaw, S. 793. Ferner speziell zum EGV Geiger, JZ 1995, 974. Art. 300 I S. 1 setzt nämlich eine spezielle Ermächtigungsnorm voraus. Lorenz, 65.

[18] Zu den Einstimmigkeiten Hasse, S. 17; Oppermann, RIW 1995, 925.

III. 1. Allgemeine Fragen und die rechtliche Lage vor dem WTO-Gutachten

III. 1. 1. Explizite und implizite Zuständigkeiten

Die Außenkompetenzen sind einerseits entweder die, die explizit die Befugnis zum Abschluss von Verträgen verleihen,[19] oder die ungeschriebenen, oder stillschweigenden,[20] die aus den internen Zuständigkeiten abgeleitet und vom EuGH als auswärtige Kompetenznorm anerkannt worden sind.[21] Die impliziten Außenzuständigkeiten folgen aus einer praktischen Notwendigkeit der Handlungseinheit der EG:[22] die Mitgliedstaaten könnten die Zielerreichung der internen EG-Kompetenzen und/oder das Wirksamwerden der aufgrund dieser Kompetenzen getroffenen Regelungen enorm gefährden, wenn ihnen gestattet wäre, ohne Rücksicht auf ihre EG-vertraglichen Verpflichtungen völkerrechtliche Bindungen einzugehen. Sie haben also stillschweigend die notwendigen Kompetenzen zum Abschluss völkerrechtlicher Verträge der EG übergeben, ohne die die Funktionalität der Ausübung der internen Kompetenzen nicht sichergestellt werden kann.

Diese stillschweigenden Kompetenzen können aus dem Erlassen von Vorschriften im Innenbereich, wie es in der Rs. AETR bestätigt wurde,[23] folgen.[24] Die so geschaffene Parallelität der Binnen- und Außenkompetenzen war eine Schöpfung des Richterrechts, jedoch fand sie später ihre Anerkennung in einer Erklärung zum Maastrichter Unionsvertrag,[25] und damit ist diese prätorische Rechtsfortbildung gemäß Art. 31 Abs. 2 lit. a) WVRK[26] bindendes Vertragsrecht geworden.

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[19] Wie im Bereiche der Devisenregelung (Art. 111 EGV), der Zoll- und Handelspolitik (Art. 133 EGV), die Zusammenarbeit auf dem Gebiete der Bildung (Art. 149 Abs. 3, 150 Abs. 3 EGV), Kultur (151 Abs. 3 EGV), des Gesundheitswesens (Art. 152 Abs. 3), der transeuropäischen Netze (Art. 155 Abs. 3), der Forschung (Art. 164 lit. b), 170 EGV), der Umweltpolitik (Art. 174 Abs. 4.), sowie der Entwicklungspolitik (Art. 181 EGV). Weitere spezielle Kooperationsformen sind noch im sechsten Teil des EGV verankert: Beziehungen zu internationalen Organisationen im Allgemeinen (Art. 302 EGV), zu den VN und ihren Fachorganisationen (Art. 303 EGV), dem Europarat (Art. 303 EGV), der OECD (Art. 304), und Zuständigkeit zum Abschluss von Assoziierungsabkommen (Art. 310 EGV).

[20] Sog. *Implied powers* – allg. zur Lehre der *implied powers* Dörr, EuZW 1996, 40.

[21] Nicholaysen, S. 294; zu den ungeschriebenen Kompetenzen Nettesheim, in: Bogdandy, 433 ff.

[22] So kann man diese Kompetenzen als Ausprägungen des effet utile Grundsatzes auffassen. Vgl. Lorenz, S. 89; Dörr, EuZW 1996, 40.

[23] Rs. 22/70, Slg. 1971, 263

[24] Starke aber wenig zutreffende Kritik dazu bei Hartley, S. 231 f.

[25] „ERKLÄRUNG zu den Artikeln 109, 130 r und 130 y des Vertrags zur Gründung der Europäischen Gemeinschaft Die Konferenz vertritt die Auffassung, daß Artikel 109 Absatz 5, Artikel 130 r Absatz 4 Unterabsatz 2 und Artikel 130 y nicht die Grundsätze berühren, die sich aus dem Urteil des Gerichtshofs in der AETR-Rechtssache ergeben."

[26] Dazu Vitzthum, in: Vitzthum 1. Abschnitt, Rn.123

„Neben dieser Gemeinschaftszuständigkeit kann es keine konkurrierende Zuständigkeit der Mitgliedstaaten geben."[27] Die Ausschließlichkeit der Gemeinschaftszuständigkeit und die Sperrwirkung des Gemeinschaftsrechts gegenüber dem mitgliedstaatlichen Gestaltungsraum treten in diesem Falle mit dem Erlassen der internen Vorschrift ein.[28]

Eine andere Quelle der auswärtigen Gemeinschaftskompetenzen können aber auch die primärrechtlichen Vertragsbestimmungen als solche bieten. Diese ist die sog. Auflockerung der AETR-Doktrin,[29] gemäß dem die bloße Ermächtigung der Gemeinschaft zur Regelung bestimmter Bereiche, noch vor der Ausübung der durch den Vertrag geliehenen Zuständigkeiten, gegebenenfalls als eine auswärtige Handlungsermächtigung verstanden werden kann. Wenn nämlich „das Gemeinschaftsrecht den Gemeinschaftsorganen im Hinblick auf ein bestimmtes Ziel im Innenverhältnis eine Zuständigkeit verleiht", ist die Gemeinschaft befugt, „die zur Erreichung dieses Ziels erforderlichen völkerrechtlichen Verpflichtungen einzugehen, auch wenn eine ausdrückliche diesbezügliche Bestimmung fehlt. "[30]

Dadurch waren die internen und externen Zuständigkeiten in Einklang gebracht – *in foro interno, in foro externo* –, also eine Parallelität der internen und externen Zuständigkeiten war ausgearbeitet worden,[31] was auf dem Gedanken der Gleichwertigkeit autonomer und vertraglicher Regelung beruhte.[32] Die Funktionsfähigkeit der Gemeinschaft benötigt einerseits die Gewährleistung des Instrumentariums der völkerrechtlichen Verträge, andererseits wirtschaftspolitisch betrachtet, was im Außenbereich notwendig oder erfolgreich scheint, ist im Innenbereich nicht unbedingt so, und *vice versa*.[33] Also, ohne die Auflockerung der AETR-Doktrin könnten die Außenzuständigkeiten der Gemeinschaft nur dann ausgeübt werden, wenn schon eine interne Regelung getroffen worden wäre, was aber doch nicht in allen Fällen notwendig oder sinnvoll – oder etwa eine *lex superflua* – wäre.

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[27] Rs. 22/70, Rn. 30/31. Bestätigt im Gutachten 2/91.

[28] Dazu Pescatore, CMLR 1979, 619; Gilsdorf, EuR 1996, 147; Geiger, JZ 1995, 975.

[29] Oppermann, Rn. 1704; Geiger, JZ 1995, 975. „complementarity" principle bei Hartley, S. 233.

[30] So der EuGH im Gutachten 1/76, Slg. 1977, 741, vgl. weiter Rs. 3,4 und 6/76, Slg. 1976, 1279; Kramer, bestätigt im Gutachten 2/91 Rn. 7. Dazu Gilsdorf, EuR 1996, 148; Pescatore, CMLR 1977, 621; Geiger, JZ 1995, 975 f.

[31] Dörr, EuZW 1996, 41.

[32] Vgl. m. w. N. Geiger, JZ 1995, 976.

[33] Zutreffende Argumentation bei Thalheim, Zum Problem der Einheitlichkeit der Wirtschaftspolitik, 23 ff.

III.1. 2. Ausschließliche und potentielle Zuständigkeiten

Die Befugnisse der EG sind andererseits von ausschließlicher oder paralleler, potentieller Natur.[34] Welche Zuständigkeiten von ausschließlicher und welche von paralleler, potentieller, konkurrierender Natur sind, dazu bietet der Vertrag Anhaltspunkte, eindeutig entscheidet er aber nicht.[35]

Die GHP ist eine ausschließliche Zuständigkeit der Gemeinschaft, sie schützt nämlich die gemeinsamen Interessen der Mitgliedstaaten und der EG, und damit wäre ein nationaler Alleingang offensichtlich unvereinbar.[36] Die Reichweite der Ausschließlichkeit und die Anwendung der damit verbundenen, zu Art 300 EGV speziellen Vertragsabschlussregime hängen aber davon ab, was man unter GHP versteht.

Der Vertrag hilft aber einem nicht zu viel, da er die Definition der GHP nicht enthält,[37] er bezeichnet nur einige ihrer bestimmten Ziele und Instrumente. Diese sind z.B. die Zoll- und Handelsabkommen, Liberalisierungsmaßnahmen, Ausfuhrpolitik. Sie, als Widerspiegelung des visionären Plans über Europa der Nachkriegszeit,[38] dienen der Befreiung des Handels von den Folgen der früheren nationalen Autarkiepolitik,[39] z.B. von hohen Zollschranken und mengenmäßigen Beschränkungen. Diese Aufzählung ist aber nicht eine abschließende,[40] der Vertragstext ist offen, und dadurch ist sie geeignet, und gegebenenfalls sogar bedürftig, dynamisch ausgelegt zu werden. So hielt der EuGH die in sich den Außenhandel nur mittelbar beeinflussenden Neben- und Hilfsbestimmungen eines Abkommens für solche, die zur GHP gehören.[41] Anderswo betonte der EuGH die inhaltliche Übereinstimmung des Begriffs der Handelspolitik unabhängig davon, ob sie „auf die internationale Betätigung eines Staates oder der Gemeinschaft angewendet wird."[42]

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[34] Gilsdorf, EuR 1996, 146; Lorenz, 65 f., eine gute Übersicht bietet Nettesheim, in: v. Bogdandy, 453 ff.

[35] Nicht so aber der neue Verfassungsvertrag, vgl. Art. I-11. ff. EVV.

[36] Vgl. die zutreffende Argumentation des EuGH in seinem Gutachten 1/75, zur Ausschließlichkeit der GHP Emiliou, ELRev 1996, 299 f.; vgl. weiter Arnold, in: Dauses, K. I 17 ff.

[37] Streinz, Rn. 628.

[38] Dazu Streinz, Rn. 14 ff.; Herdegen, Rn. 40 ff.

[39] Gegen eine Autarkiepolitik vgl. die noch heute aktuelle und wohl zutreffende Argumentation beim Thalheim, Autarkie – Weder Ziel noch Schicksal! S. 154 ff.

[40] So der EuGH im Gutachten 1/78 Rn. 45.

[41] Gutachten 1/78 Rn. 56.

[42] Gutachten 1/75.

Wie wir schon oben gesehen haben, sind die Zuständigkeiten gemäß der AETR-Doktrin von ausschließlicher Natur.[43] Demgegenüber ist die durch die Auflockerung der AETR-Doktrin geschaffene Zuständigkeit letzthin bis zu ihrer Aktualisierung keinesfalls eine ausschließliche.[44] Ob ihr Verhältnis zur ausschließlichen Kompetenz eine konkurrierende[45] oder eine parallele[46] ist, war nach der Formulierung der Rechtsprechung des EuGH nicht ganz eindeutig. Es besteht eine konkurrierende Zuständigkeit, wenn die Mitgliedstaaten in vertraglichen Verhältnissen einzugehen, oder in anderen Formen von ihrer Kompetenz Gebrauch zu machen befugt sind, soweit und solange die Gemeinschaft ihre Zuständigkeit nicht ausgeübt hatte. Es geht um eine parallele Kompetenz, wenn die Mitgliedstaaten neben der Gemeinschaft eine Materie autonom oder vertraglich zu regeln berechtigt sind.[47]

Allerdings wurde die Lage durch das Gutachten 2/91 teilweise bereinigt, in dem der EuGH die Parallelität und die Konkurrenz nicht nur aus dem EG-Vertrag selbst, sondern auch aus den Charakteristiken der betroffenen Regelung erklärte. Im konkreten Fall sperrte die Mindestharmonisierung bestimmter arbeitsrechtlicher Bedingungen die Zuständigkeiten der Mitgliedstaaten auf diesem Gebiete nicht ab.

Die Ausschließlichkeitswirkung ist also – folgend aus dem oben Erwähnten – entweder von Anfang an präsent, wie im Falle der GHP, oder sie tritt nachträglich durch eine gemeinschaftsrechtliche Gebietsbesetzung, autonom oder vertraglich, ein.[48]

Falls die Ausschließlichkeit – anfänglich oder nachträglich – nicht festzustellen ist, also der Inhalt des Vertrages über die Kompetenz der EU hinausreicht, und in den Bereich der Mitgliedstaaten ragt, können sich die Gemeinschaft und die Mitgliedstaaten nur durch ein sog. „gemischtes Abkommen"[49] gegenüber Drittstaaten verpflichten. In diesen Fällen ist ein gemischtes Abkommen rechtlich

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[43] Hartley, S. 234.
[44] Hartley, S. 235.
[45] Rn. 22/70 Rn. 30/31.
[46] Gutachten 1/75.
[47] Zur Frage der Parallelität und Konkurrenz Geiger, JZ 1995, 976; Gilsdorf, EuR 1996, 149 ff.; Neuwahl, CMLR 1996, 667 ff.
[48] Geiger, JZ 1995, 976 f.; Lorenz, 97. ff.
[49] Ein gemischtes Abkommen liegt vor, wenn nicht nur die Gemeinschaft sondern auch einige oder alle Mitgliedstaaten daran teilnehmen. Sein Sinn ist, dass der Drittstaat an die Kompetenzzuweisung nicht zweifeln muss. Die Teilnahme der beiden möglichen zuständigen Ebenen – Gemeinschaft und Mitgliedstaaten – gewährleistet die Wirksamkeit der vertraglichen Verpflichtungen. Ferner dazu Arnold, in Dauses, K. I Rn. 77 ff.; Neuwahl, CMLR 1996, 676 ff.; Oppermann, Rn. 1712.

zwingend, da hier von einer geteilten („shared", „partagées")[50] Kompetenz die Rede ist. Dies schließt jedoch nicht aus, dass ein gemischtes Abkommen auch dann abgeschlossen werden kann, wenn die Teilnahme der Mitgliedstaaten eher politisch als juristisch fundiert ist.[51] Dies bedeutet aber gar keine Neuaufteilung der Kompetenzordnung.

Ein Zuständigkeitsvorbehalt der Mitgliedstaaten betreffend des ganzen ÜWTO ist insbesondere aufgrund seines *single-undertaking approach*,[52] und der früheren de facto Teilnahme der EG am GATT 1947 abzulehnen.

III. 2. Das Gutachten 1/94

III. 2. 1. Die Zuständigkeitsfrage das WTO-Übereinkommen betreffend

Die Zuständigkeitsfrage war schon mit der Eröffnung der achten, sog. Uruguay-Runde 1986-1994 präsent. Die Interessenvertretung der EG und der MS wurde provisorisch und pragmatisch, aber die Frage der Kompetenzverteilung offen gehalten geregelt,[53] demgemäß war die Kommission der alleinige Verhandlungsführer. Nach dem Abschluss der Verhandlungen war die Kommission der von der Mehrheit der Mitgliedstaaten nicht geteilten Auffassung,[54] dass die getroffenen Regelungen von der handelspolitischen auswärtigen Zuständigkeit der Gemeinschaft erfasst werden.

Trotz ihrer Meinungsverschiedenheiten haben die EG und die MS den Vertrag zusammen unterzeichnet, damit die Wirksamkeit der vertraglichen Verpflichtungen gegenüber den anderen über die Meinungsverschiedenheiten innerhalb der EU informierten WTO-Vertragsparteien sichergestellt ist.[55]

Die Kommission wandte sich aber nach der Ratstagung vom 7. und 8. März 1994, an der die Mehrheit der Mitgliedstaaten ihre Position aufrechterhielt, an den Gerichtshof gemäß Artikel 228 Abs. (6) EGV um ein Gutachten zur Vereinbarkeit des WTO-Abkommens mit dem EG-Vertrag zu erbitten.[56]

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[50] Nach Neuwahl sind diese die horizontal geteilten Kompetenzen – *horizontally shared competences* oder *horizontal mixity*, Neuwahl, CMLR 1996, 674 ff. Die Idee der geteilten Kompetenzen ist im EVV aufrechterhalten, dazu Streinz/Ohler/Herrmann, S. 72. f.

[51] Oppermann, Rn. 1711; Nettesheim, in: Bogdandy, 457.

[52] Weiß – Herrmann, Rn. 102, 170 ; Oppermann, RIW 1995, 922 f.; Emiliou, 21 ELRev (1996) 294, 297.

[53] „La présente décision ne préjuge pas la question de la compétence de la Communauté et ou des Etats membres sur des sujets particuliers." Ratsentscheidung vom 20.9.1986, zitiert nach Krenzler/da Fonseca-Wollheim, EuR 1998, 226, Fn.7.

[54] Krenzler/da Fonseca-Wollheim, EuR 1998, 226.

[55] Vgl. Jansen, EuZW 1994, 336. Allg. zu den Interessen der Drittstaaten Pescatore, CMLR1979, 626 f.

[56] Zu der Vorgeschichte des Gutachtens und der Meinungsverschiedenheit Krenzler/da Fonseca-Wollheim, EuR 1998, 226; Emiliou, ELRev 1996, 297 f.; Eine interessante Analyse und einen Vergleich mit der US-amerikanischen Verfassung bietet Bello, AJIL 1995, 784 f.

Die Kommission wartete auf die Beantwortung der drei folgenden Fragen:[57]

- ob die Abkommen über den Handel mit Dienstleistungen (GATS) und über den Schutz handelsbezogener Aspekte des Rechts an geistigem Eigentum (TRIPs) allein auf der Grundlage von Artikel 133 EGV oder in Verbindung mit Artikel 95 und/oder 308 EGV abgeschlossen werden könnten und müssten,
- ob die EG, aufgrund einer im EGV verankerten Kompetenznorm, betreffend der in den ausschließlichen Anwendungsbereich des EGKS-Vertrags und des EAG-Vertrags fallenden Erzeugnisse und/oder Dienstleistungen völkerrechtliche Verpflichtungen eingehen kann,
- wie verhält sich eine angenommene ausschließliche Kompetenz der EG zur mitgliedstaatlichen Stellung von EG-Mitgliedstaaten in der WTO?

III. 2. 2. Der Inhalt des Gutachtens

Das Gutachten[58] enttäuschte die Kommission. Der EuGH folgte ihre Argumentation nur beschränkt, eher schloss er sich den Mitgliedstaaten an, und stellte fest, dass zwar GATT 1994 unter der GHP falle, die beiden anderen Abkommen aber Gegenstände der geteilten Kompetenzen der Gemeinschaft und der Mitgliedstaaten seien, und damit das ÜWTO ein gemischtes Abkommen sei.

III. 2. 2. 1. Die explizite auswärtige Zuständigkeit der Gemeinschaft

III. 2. 2. 1. 1. Multilaterale Handelsübereinkommen – Pyrrhussieg der Kommission

Der Gerichtshof stellte fest, dass die ausschließlichen gemeinschaftlichen Zuständigkeiten den Abschluss von Abkommen über den Handel mit Waren umfassen, und zwar unabhängig davon, ob sie landwirtschaftliche, EGKS- oder Euratom-Erzeugnisse sind. Diese Themen waren aber gar nicht *„le coeur du litige"*.

Betreffend der EGKS-Erzeugnisse geht die Argumentation (Rn. 25 ff.) um die allgemeine Natur des GATT 1994, das alle Produkte umfasse, und darum, dass die Zuständigkeit von der Spezialität des EGKS-Vertrages nicht berührt

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[57] Die einfache Frage, ob das ÜWTO mit dem EG-Vertrag vereinbar ist, hat der EuGH nach Pescatore unmittelbar nicht beantwortet, Pescatore, CMLR 1999, 401.

[58] Ob hier um ein Gutachten im wirklichen Sinne geht, ist jedoch fraglich. Die Entscheidung ähnelt sich weniger den objektiven Klarstellungen der rechtlichen Lage, sondern sie folgt die Logik eines kontradiktorischen Verfahrens, insofern beschränkte sich das Gericht nur auf die von den Parteien beigebrachten rechtlichen Argumente. Deshalb sehr kritisch Pescatore, CMLR 1999, 392 f.

werde.[59] Im Falle der Euratom-Produkte ist der EuGH wenig verständlich, da er die gemeinschaftliche Kompetenz völlig falsch,[60] mit dem Mangel der entsprechenden auswärtigen Kompetenzen im Euratom-Vertrag begründet.[61] Was die Agrarprodukte betrifft, hat die tiefgehende Argumentation (Rn. 28. f.) des EuGH wenig Sinn. Entweder sind sie von den expliziten Zuständigkeiten der EG erfasst, oder als Erzeugnisse eines völlig vergemeinschafteten Wirtschaftszweiges fallen sie gemäß der AETR-Doktrin unter implizite Zuständigkeiten.[62] Folgend der auf die Agrarprodukte angewandten Logik stellte der EuGH ebenso die ausschließliche Gemeinschaftszuständigkeit für das Übereinkommen über die Anwendung gesundheitspolizeilicher und pflanzenschutzrechtlicher Maßnahmen fest (Rn. 30 f.), und eher apodiktisch aber völlig zutreffend erkannte er die EG-Kompetenz in Hinsicht auf technische Handelshemmnisse (32 f.) an.[63]

III. 2. 2. 1. 2. Sachlicher Anwendungsbereich der GHP und die GATS und TRIPs Abkommen

Was die anderen zwei Abkommen betrifft, folgte der EuGH einer engherzigen Auslegung, die weder im Hinblick auf seine frühere Rechtsprechung noch auf andere Teile des Gutachtens adäquat war.

Das GATS Abkommen betreffend (Rn. 42. ff) beschränkt sich die ausschließliche handelspolitische Zuständigkeit der Gemeinschaft, so mindestens der EuGH, nur auf diejenige Dienstleistungen, für deren Erbringung eine Grenzüberschreitung durch Personen nicht erforderlich sei (*cross-border supply*), da sie mit dem Warenaustausch vergleichbar seien.

Dies treffe aber im Falle der drei anderen Typen von Dienstleistungen nicht zu, infolge dessen fallen sie nicht unter die GHP, sondern der EGV enthalte für sie spezifische Regime, nämlich die Niederlassungs- und Dienstleistungsfreiheit. Die von *der GHP nicht umfassten* Dienstleistungserbringungstypen sind: (1) der Verbrauch im Ausland, der die Grenzüberschreitung des Konsumenten erfordere (*consumption abroad* – typisch Tourismus), (2) Dienstleistungserbringung mittels kommerzieller Präsenz (*commercial presence*), (3) Dienstleistungserbringung mittels Präsenz natürlicher Personen *(presence of natural persons).*[64]

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[59] Dies hält Pescatore rechtens für schon seit langem gelöst (Siehe Gutachten 1/75), und somit für ein „side-issue", Pescatore, CMLR 1999, 393. Vgl. ferner Bourgeois, CMLR 1995, 778; Bello, AJIL 1995, 775; kritisch zur Folgerung des EuGH Lorenz, 70. f.

[60] Vgl. Pescatore, CMLR 1999, 393. Dagegen Lorenz, 69.

[61] Vgl. aber Art. 101 ff. Euratom-V.

[62] Lorenz, 71 ff.

[63] Bello, AJIL 1995, 776.

[64] Zu den Erbringungstypen Senti, S. 69.; Weiß-Herrmann, Rn. 842 ff.

Die erwähnte Logik wendete der EuGH auch bezüglich der Verkehrsdienstleistungen an (Rn. 48. ff.): (1) sie sind Gegenstand eines anderen Titels des EG-Vertrages, da sie in der GHP nicht inbegriffen sind. Weiterhin fügt er hinzu, (2) diese Folgerung werde durch das AETR-Urteil bestätigt, (3) eine Menge von internationalen Verträge seien schon auf dieser selbstständigen Grundlage abgeschlossen worden, (4) und letztlich seien die gemäß Art. 113 anordneten und auch die Verkehrsdienstleistungen berührenden Embargomaßnahmen keinesfalls relevant.[65]

Im Bezug auf das TRIPs-Abkommen billigte der Gerichtshof eine ausschließliche Gemeinschaftszuständigkeit ebenso äußerst beschränkt, nur im Falle der gegen Produktpiraterie an den Außengrenzen der Gemeinschaft erforderlichen Maßnahmen. Sie betreffen Ware, also Substanzwirtschaft, und deshalb können sie unter den Begriff der GHP subsumiert werden.[66] Andere Teile des Abkommens hielt der EuGH nicht für handelspolitische, und damit nicht unter Art. 133 EGV fallende, welche Folgerung teils logische Konsequenz der das GATS Abkommen betreffend angewandten Argumente ist.

Im Einzelnen argumentierte der EuGH, wie folgt:[67] (1) ein bloßer Zusammenhang zwischen dem geistigen Eigentum und dem internationalen Handel, der aber den Binnenhandel ebenso charakterisiert, bietet keinen Rechtfertigungsgrund für Subsumtion unter die GHP. Weiterhin (2) *„könnten sich die Gemeinschaftsorgane den Zwängen entziehen, denen sie intern hinsichtlich des Verfahrens und der Art der Beschlußfassung unterliegen"*, wenn es ihnen gestattet wäre, ein die Harmonisierungsmaßnahmen beinhaltendes Abkommen zu schließen,[68] (3) eine Organpraxis ändert keinesfalls die Zuständigkeitsverteilung des EGV.[69]

Teilzusammenfassung und Kritik: Die Logik der Begründung basiert also auf einer sehr restriktiven Auslegung der GHP, der EuGH versteht sie als eine Substanzwirtschaft, und die Zuständigkeit die anderen zwei Abkommen betreffend, betrachtet er nur mit Hinblick auf die Ähnlichkeit zum Warenverkehr oder mögliche Anwendbarkeit der Warenverkehrsregime.[70]

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[65] Bourgeois, CMLR 1995, 770 f.; Bello, AJIL 1995 777 f. Die Bestätigung dieser Rechtsprechung im Gutachten 2/92 – Begründung IV. 10.

[66] Bello, AJIL 1995, 778.

[67] Emiliou, ELRev 1996, 304 f.; Bourgeois, CMLR 1995, 771 ff.

[68] Die Gemeinschaftsorgane waren gar nicht der Absicht sich von den EG-vertraglichen Verpflichtungen zu lösen zu versuchen, da die Kommission bezüglich des Abschlusses *nach Zustimmung des Parlaments* einen *einstimmigen* Ratsbeschluss vorschlug, Krenzler-da Fonseca-Wollheim, EuR 1998, 226; Bourgeois, CMLR 1995, 772.

[69] Dieses letzte Argument ist schwer zu verstehen, wenn der EuGH selbst anderswo (Rn. 50) seine Begründung eben auf die Organpraxis basiert. Dazu Bourgeois, CMLR 1995, 778.

[70] Pescatore, CMLR 1999, 393; Bourgeois, CMLR 1995, 770 ff.; Emiliou, ELRev 1996, 303 ff.

Es ist schwer zu verstehen, und der EuGH war gar nicht bereit zu erklären, warum der „Handel" mit Dienstleistungen (GATS) oder die „handelsbezogenen" Aspekte des geistigen Eigentums (TRIPs) nicht unter dem Begriff „Handelspolitik" fallen.[71] Die Unbeantwortung dieser Frage ist noch abstruser im Lichte der früheren Rechtsprechung,[72] nach der die Breite der gemeinschaftlichen Handelspolitik das Terrain der staatlichen umfasst,[73] und nach der die Entwicklungen der internationalen Wirtschaft einzubeziehen sind.[74] Die zwei Abkommen sind aber – im Wesentlichen – Gegenstände der mitgliedstaatlichen Handelspolitik, deshalb gehören die nötigen Zuständigkeiten zu ihnen. Der EuGH hat also die frühere Praxis aufgehoben (overrule),[75] sonst wäre sein Urteil eine *contradictio in adiecto*. So hat der EuGH naturgemäß die Dynamik der früheren Rechtsprechung bzw. des angewandten *effet utile* Grundsatzes aufgegeben, sowie scheint er mit der sehr starken Orientierung am Wortlaut auch die Doktrin des *originalism*[76] nach der These der *implied powers* aus der US-amerikanischen Verfassungslehre zu importieren. Ob dies vernünftig war,[77] mit besonderer Rücksicht auf die wesentliche Umwandlung der Charakteristika des Welthandels,[78] ist eine rechtspolitische Frage, das war aber keinesfalls eine notwendige Folgerung. Mit Rücksicht auf die Erklärung der Mitgliedstaaten zum Maastrichter Vertrag, in der sie die AETR–Doktrin bestätigten,[79] und damit die restriktive Auslegung der auswärtigen Kompetenzen eher abzulehnen schienen, war die beschränkende Interpretation eher *contra legem*.

Was das GATS betrifft, sind die Ableitungen auch schwer zu folgen. Die Ablehnung der Gemeinschaftszuständigkeit aufgrund der systematischen Stellung der GHP, der Dienstleistungs- und Niederlassungsfreiheit und der Verkehrspolitik könnte als solche eine korrekte Begründung sein, wenn die im selben Gutachten angewandten Argumente des EuGH die Euratom-, EGKS-, und Agrarprodukte betreffend mit dieser Folgerung nicht konfrontierten. Das Spezialitätsargument, besonders im Falle der Euratom-Produkte, wäre ebenso anzuwenden, was die Anwendbarkeit der GHP ausgeschlossen hätte.

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[71] Eine völlig zutreffende semantische Argumentation bei Pescatore, CMLR 1999, 392.

[72] Vgl. etwa Bello, AJIL 1995, 776 f.

[73] Gutachten 1/75.

[74] Gutachten 1/78 Rn. 43. „(...)liegt es auf der Hand, dass eine zusammenhängende Handelspolitik nicht mehr betrieben werden könnte, wenn die Gemeinschaft nicht in der Lage wäre, ihre Zuständigkeit auch im Hinblick auf eine Kategorie von Übereinkommen wahrzunehmen, die sich neben den herkömmlichen Handelsübereinkommen zu einem Hauptfaktor in der Regelung der internationalen Wirtschaftsbeziehungen entwickeln." Dieses Gutachten wird natürlich zitiert, aber es scheint keine Wirkung auf das Gutachten 1/94 betreffend des GATS und des TRIPs zu haben, vgl. Bourgeois, CMLR 1995, 779; Pescatore, CMLR 1999, 399.

[75] Die Bestätigung der restriktiven Auslegung im Gutachten 2/92.

[76] Vgl. Marsh v. Chambers, U.S. Supreme Court, 463 U.S. 783 (1983).

[77] Zusammenfassend Pescatore, CMLR 1999, 387 ff.

[78] Vgl. etwa Krenzler-da Fonseca-Wollheim, EuR 1998, 225; Krenzler 1997, 41; Krenzler 2004, 386 ff.; auf dem gebiete der Dienstleistungen Senti, 67.

[79] Der Text im Fn. 25.

Die Argumente in Bezug auf das TRIPs Abkommen sind auch wenig beeindruckend. Zuerst scheint der EuGH das Ziel des TRIPs fehlerhaft zu verstehen,[80] als ob der Hauptzweck des TRIPs darin bestünde, *„den Schutz des geistigen Eigentums weltweit zu verstärken und zu harmonisieren."* (Rn. 58) Die von Frankreich vorgebrachten Argumente werden dadurch entkräftet, dass die meisten EU-Mitgliedstaaten – außer die belgische und irische Mitgliedschaft im Berner Abkommen – schon vor dem beabsichtigten Abschluss des ÜWTO an den durch das TRIPs inkorporierten internationalen Übereinkommen beteiligt waren, und zwar in der schutzintensivsten Fassung.

Es ist ebenso fraglich, warum nur ein bloßer, nicht typisch internationaler, also die Anwendbarkeit der GHP ausschließender Zusammenhang zwischen IP-Rechte und der Handelspolitik festzustellen ist, wenn im Falle der technischen Handelshemmnisse der Zusammenhang stark genug war das fragliche Abkommen unter die GHP zu subsumieren.[81]

Es ist ebenso zu bemerken, dass der Gerichtshof in seiner späteren Rechtsprechung einige Rechte, auf die sonst das TRIPs-Abkommen anzuwenden wäre, unter die GHP und damit seine eigene Begründung in Zweifel zog.[82]

III. 2. 2. 2. Implizite Zuständigkeiten – Abkehr von der AETR-Logik – Gemischtes Abkommen

Falls die expliziten auswärtigen Kompetenzen den Abschluss des GATS- und des TRIPs-Abkommens nicht umfasst hätten, hätte die Kommission weitere Argumente zur Unterstützung der Gemeinschaftskompetenz: (1) der Vertragsabschluss sei notwendig, (2) Artt. 95 und 308 verleihen die Kompetenzen der EG, (3) speziell im Falle des GATS werden Befugnisse noch durch die internen Zuständigkeiten verliehen, und (4) im Falle des TRIPs seien sie durch das sekundäre Gemeinschaftsrecht geschaffen.[83]

Nach dem EuGH sind diese Abkommen und die gemeinschaftliche Beteiligung an diesen keine notwendige Voraussetzung der Verwirklichung der Ziele des EGV. Unter der Notwendigkeit verstand der EuGH im Vergleich mit der früheren Rechtsprechung eher restriktiv eine zwingende Untrennbarkeit[84] der inneren und äußeren Aspekte der Regelungsmaterie (Rn. 86). Die Frage ist in die-

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[80] Rechtens Bourgeois, CMLR 1995, 777.

[81] Bourgeois, CMLR 1995, 776 f.

[82] Rs. C-347/03, Regione autonoma Friuli-Venezia Giulia et Agenzia regionale per lo sviluppo rurale (ERSA) gegen Ministero delle Politiche Agricole e Forestali, Rn. 75. ff, insb. 80. ff. In diesem Fall ging es um den Schutz geographischer Angaben gemäß Art. 23 TRIPs, dazu Weiß – Herrmann, Rn. 934.

[83] Bello, AJIL 1995, 780.

[84] Geiger, JZ 1995, 980.

sem Falle völlig berechtigt, warum das *single-undertaking approach*, also die Untrennbarkeit der einzelnen Abkommen von einander (GATT, GATS, TRIPs), keine Rolle in der gerichtlichen Auslegung der Notwendigkeit gespielt hat.[85] Wenn man noch in Kauf nimmt, dass das *single-undertaking approach* eine grundsätzlich europäische Idee war, ist der gerichtliche Gedankengang noch verwunderlicher.[86]

Abgesehen von einer zwingenden Notwendigkeit der Beteiligung etwaiger Drittstaaten in einem Regelungsstoff, folgt aus den Artt. 95 und 308 automatisch keine auswärtige Vertragsschlusskompetenz, d.h. praktisch ebenso wenig aus keiner anderen internen Regelungsbefugnis. Dies ist nur dann der Fall, wenn die Zuständigkeiten vollständig ausgeübt oder die EG-Organe zu Verhandlungen mit Drittstaaten ermächtigt worden waren.[87] Diese Auslegung der AETR-Rechtsprechung verwechselt die Existenz und die Ausschließlichkeit einer auswärtigen Kompetenz,[88] die einerseits die AETR-Doktrin fast aller außenwirtschaftspolitischen Potentialität beraubt, andererseits die schwerwiegende Frage beinhaltet, ob diese Vorstellung des EuGH mit der gemeinschaftsrechtlichen Kompetenzverteilung und dem Grundsatz der begrenzten Einzelermächtigung vereinbar ist. Da die EG nach der gerichtlichen Argumentation bis zur Ausübung ihrer internen Befugnisse auch keine externe Kompetenz hat, schaffen sich die Organe die notwendigen Ermächtigungen praktisch durch Rechtssetzung, etwa wie ein Münchhausen. Dieses Ergebnis ist aber mit der begrenzten Einzelermächtigung schwer vereinbar, da die Kompetenzen nach diesem Grundsatz mindestens in ihrer aktualisierbaren Potentialität schon vorliegen sollten.[89]

Da in Bezug auf Niederlassungsfreiheit und freie Dienstleistungserbringung keine untrennbare Notwendigkeit der Teilnahme an einem internationalen Abkommen folgte, weiterhin der interne Markt weder auf dem Gebiete des GATS noch des TRIPs vollständig geregelt war, und es keine Bevollmächtigung seitens der Mitgliedstaaten gab, sah der EuGH keinen Grund die ausschließliche Zuständigkeit der Gemeinschaft anzuerkennen. Das ÜWTO stellte also ein gemischtes Übereinkommen dar, das ebenso von der EG wie von ihren Mitgliedstaaten zu ratifizieren war. Dies bietet aber den einzelnen Mitgliedstaaten riesige Gelegenheiten ihre notwendige Zustimmung von der Befriedigung ihrer gegebenenfalls sachfremden gemeinschaftsinternen Bedürfnissen abhängig zu machen. Diese Situation ist dann noch schwerwiegender, wenn auch Drittstaa-

[85] Bourgeois, CMLR 1995, 777.
[86] Hilf, EJIL 1995, 258.
[87] Emiliou, ELRev 1996, 307 f.; Hilf, EJIL 1996, 254; Bello, AJIL 1995, 782 f.
[88] Geiger, JZ 1995, 979 f.; Gilsdorf, EuR 1996, 156 f.
[89] Zutreffende Begründung bei Bleckmann, EuR 1977, 109 ff.

ten davon Nutzen ziehen können.[90] Da es in den wirtschaftlichen Verhandlungen immer seltener nur um den klassischen Warenhandel geht, ist der auswärtige Spielraum der EG im Allgemeinen beschränkt geworden.

III. 2. 2. 3. Streitbeilegung und Pflicht der Zusammenarbeit

Der EuGH bemerkte natürlich, welche Implikationen und praktische Schwierigkeiten ein gemischtes Abkommen mit sich bringt, und aufgrund der Notwendigkeit einer geschlossenen völkerrechtlichen Vertretung der Gemeinschaft, insbesondere im Rahmen des Streitbeilegungsverfahrens und des *cross-retaliation* Mechanismus,[91] ordnete er die Pflicht der engen Zusammenarbeit zwischen den Mitgliedstaaten und der Gemeinschaft an.[92]

Diese aus der Gemeinschaftstreue fließende Pflicht[93] ist einerseits keine neue Idee,[94] andererseits „bietet keinen adäquaten Ausgleich",[95] insbesondere deshalb, weil dieses sibyllinische, dem kantischen kategorischen Imperativ ähnelnde Gebot mit keiner konkreten Einzelpflicht ausgestattet ist.[96] Die EG-Organe versuchten die Kooperationspflicht durch einen Verhaltenskodex auszufüllen, aber ihre Bemühungen blieben teils deshalb erfolglos, weil einige Mitgliedstaaten im Gutachten ein Mittel zur Legitimation ihres nationalen Alleingangs sahen.[97]

III. 3. Corrigenda zum Gutachten 1/94 – Amsterdam, Nizza und der EVV

Das vielfach kritisierte Gutachten hatte die Wirkung, dass die GHP Thema der späteren Verhandlungen war.

III. 3. 1. Amsterdam

An der Amsterdamer Regierungskonferenz war die GHP ein viel diskutiertes Thema,[98] doch wurde das Gutachten 1/94 nur geringfügig,[99] bzw. gar nicht[100] korrigiert. Nach dem Scheitern einer umfassenden Neuregelung der gemein-

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[90] Deshalb kritisch Krenzler – da Fonseca-Wollheim, EuR 1996, 229.

[91] Zu diesem Mechanismus Weiß- Herrmann, Rn. 319; speziell im Falle der EG Krenzler – da Fonseca-Wollheim, EuR 1998, 232 f.

[92] Bello, AJIL 1995, 783 f., Krenzler – de Fonseca–Wollheim, EuR 1998, 228.

[93] Hilf, EJIL 1995, 256.

[94] Vgl. Gutachten 2/91; ferner Pescatore, CMLR 1979, 643 f.

[95] Geiger, JZ 1995, 981; Bourgeois, CMLR 1995, 784. Vgl. ferner Hilf, EJIL 1995, 255.

[96] Emiliou, ELRev 1996, 309; eine Zusammenfassung der Kritik bei Krenzler – da Fonseca-Wollheim, EuR 1998, 230, Fn. 21.

[97] Krenzler – da Fonseca-Wollheim, EuR 1998, 233.

[98] Krenzler – da Fonseca-Wollheim, EuR 1998, 234 ff.; Des Nerviens, RTDE 1997, 801 f.

[99] Dashwood, CMLR 1998, 1021.

[100] Aufgrund des geschafften *circulus vitiosus* so Pescatore, CMLR 1999, 402. Damit einverstanden Lorenz, 106.

schaftlichen Außenkompetenzen schlug die Kommission die Ergänzung des Art. 133 mit einem neuen Absatz 5 vor, der lautet, wie folgt:

(5) Der Rat kann auf Vorschlag der Kommission und nach Anhörung des Europäischen Parlaments durch einstimmigen Beschluss die Anwendung der Absätze 1 bis 4 auf die internationalen Verhandlungen und Übereinkünfte über Dienstleistungen und Rechte des geistigen Eigentums ausdehnen, sofern sie durch diese Absätze nicht erfasst sind.

Dieser Absatz ermöglichte, mindestens theoretisch, die Ausdehnung der auswärtigen Kompetenzen der EG-Kommission durch einen Ratbeschluss, also ohne die Abänderung des primären Rechts.

Die Ausdehnungsmöglichkeit ist nicht eine allgemeine. Die schon durch die ersten vier Absätze umfassten Bereiche der Dienstleistungen und der Rechte am geistigen Eigentum werden nicht berührt, in diesem Sinne wird das Gutachten 1/94 respektiert.[101] Da aber nur externe Kompetenzen geschaffen worden sind, war weiterhin fraglich, ob und in welchem Maße sie die Rechte am geistigen Eigentum umfassen, die nach der gerichtlichen Auslegung eher den internen legislativen Bereich berühren.[102]

Nach dem Wortlaut war die Ausdehnung eher als eine permanente und nicht als eine ad-hoc konzipiert.[103]

Was aber der fünfte Absatz wirklich bedeutete, konnte man nicht erproben, da das innewohnende Einstimmigkeitserfordernis ihn seiner praktischen Bedeutung beraubte,[104] und damit blieb die GHP auch für die nächste Vertragsänderung ein ungelöstes Problem.[105]

III. 3. 2. Nizza

Die Verhandlungen an der Regierungskonferenz in Nizza hatten ebenso das Ziel das Erbe des Gutachtens 1/94 zu lösen.[106] Die Absätze drei[107] und fünf wurden prozedural und inhaltlich geändert, Abs. (5) wurde sogar völlig neu gefasst, und zwei neue Absätze – Abs. (6) und (7) – wurden dem Art. 133 EG hinzugefügt. Die ganze Neuregelung ist eher eine Festigung des *status quo*, als ein zukunftsorientiertes Erwecken der Dynamik der GHP.

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[101] Krenzler – da Fonseca-Wollheim, EuR 1998, 239.
[102] Dashwood, CMLR 1998, 1022 f.
[103] Krenzler – da Fonseca-Wollheim, EuR 1998, 239.
[104] Dashwood, CMLR 1998, 1023.
[105] Krenzler – Pitschas, EuR 2001, 443
[106] Zur Verhandlungsgeschichte Krenzler – Pitschas, EuR 2001, 443 ff.; Herrmann, CMLR 2002, 12 ff.
[107] Die Änderungen sind Ausprägungen des Konformitäts- und Kohärenzgrundsatzes, und damit bringen sie die begrenzte Einzelermächtigung zum Ausdruck. Diese Idee ist ferner im Abs. (6) mit einem ausdrücklichen ultra vires Verbot verstärkt. Krenzler – Pitschas, EuR 2001, 448 ff., und 457. Vgl. ferner Herrmann, CMLR 2002, 26 f.

Im ersten UA des Abs. (5) geht es um die Aushandlung und den Abschluss und auch um die Geltendmachung[108] der vertraglichen Verpflichtungen. Die Breite der so geschaffenen echten Verbandskompetenzen[109] orientiert sich nach dem Gutachten 1/94. Die genannten Übereinkünfte, den Handel mit Dienstleistungen und die Handelsaspekte des geistigen Eigentums betreffend sind also diejenigen, über die früher die Gemeinschaft nicht disponieren konnte, die also nicht von den Absätzen eins bis vier erfasst waren und sind.

Die Anwendung des Absatzes (5) auf geistiges Eigentum ist auch durch Abs. (7) begrenzt, und zwar praktisch auf das TRIPs Abkommen beschränkt. Da die gemeinschaftliche Kompetenz auf die nicht handelsbezogenen Aspekte des geistigen Eigentums gemäß dem Absatz (7) ausgedehnt werden kann, hätte der Abs. (7) sonst keinen Sinn, wenn Abs. (5) eine breitere Anwendung finden sollte. Aber es ist ebenfalls festzustellen, dass eventuelle Änderungen des TRIPs Abkommen ebenso vom Abs. (5) erfasst sind.[110]

In prozeduraler Hinsicht enthält Abs. (5) UA 2 zweierlei Ausnahmen: einerseits wenn die *„Abkommen Bestimmungen enthalten, bei denen für die Annahme interner Vorschriften Einstimmigkeit erforderlich ist"*, andererseits *„wenn ein derartiges Abkommen einen Bereich betrifft, in dem die Gemeinschaft bei der Annahme interner Vorschriften ihre Zuständigkeiten nach diesem Vertrag noch nicht ausgeübt hat."*

Die Einstimmigkeit ist auch nur mit Rücksicht auf das WTO-Gutachten zu verstehen: Der EuGH stellte nämlich fest (Rn. 59), dass die GHP die Gemeinschaft keinesfalls dazu ermächtige die Stimmquoren umzugehen, also solche Übereinkommen über handelsbezogene Aspekte des geistigen Eigentums abzuschließen, die intern eine Harmonisierungswirkung hätten, die aber nur mit anderen Stimmquoren bzw. Abstimmungsverfahren zu erreichen seien.[111] Diese Aussage hat im Dienstleistungsbereich eher geringe praktische Bedeutung,[112] was aber das geistige Eigentum betrifft, ist sie schon problematischer, da die möglichen Rechtsgrundlagen – Artt. 94, 95, 308 EGV – die verschiedensten Verfahren und Mehrheitsregelungen enthalten. Es ist zuzugeben, dass die Aspekte des geistigen Eigentums, die nur aufgrund Art. 95 harmonisiert werden, wegen der Spezialität dieses Artikels nicht unter Art. 133 V UA 2 EGV fallen.[113]

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[108] Herrmann, EuZW 2001, 271, ders. CMLR 2002, 17.
[109] Herrmann, EuZW 2001, 271; Krenzler – Pitschas, EuR 2001, 451.
[110] Herrmann, EuZW 2001, 271; Ders. CMLR 2002, 18 f.; Krenzler – Pitschas, EuR 2001, 451.
[111] Herrmann, EuZW 2001, 273.
[112] Krenzler – Pitschas, EuR 2001, 452.
[113] Krenzler – Pitschas, EuR 2001, 452.

Die Ausübung der internen Zuständigkeiten ist auch eine Folgerung des WTO-Gutachtens, und ist nur als solche zu verstehen. Die Ausübung der Gemeinschaftszuständigkeiten kann nicht eine vollständige Regelung bedeuten. Wenn eine *vollständige* Regelung vorliegt, dann kann der nationale Alleingang das gemeinsame Interesse gefährden, also gehört die Materie zur ausschließlichen gemeinschaftlichen Zuständigkeit, und zwar gemäß Art. 133 I EGV (Rn. 96, 100, WTO-Gutachten). Wenn nur eine vollständige Regelung die Ausübung bedeutete, dann fielen alle Fälle unter Abs. (1), deshalb würde der inkriminierte Unterabsatz keine Anwendung finden und dann hätte er auch keinen Sinn. Eine teilweise ausgeübte Kompetenz ist schon als Ausübung anzuerkennen, und deshalb ist die Ausnahme nicht anzuwenden.[114] Ob die Ausübung schon in Kraft getretene Regeln bedeutet oder die internen Vorschriften schon früher eine solche Wirkung haben könnten, kann auch fraglich sein. Aus dem Loyalitätsgrundsatz folgt, dass die schon erlassenen, aber noch nicht in Kraft getretenen Normen auch einen solchen Effekt mit sich bringen, sonst könnten die bei der Stimmabgabe niedergeschlagenen Staaten ihre eigenen Interessen mittels des Einstimmigkeitserfordernisses durchsetzten und damit ebenso ihre gemeinschaftlichen Verbindlichkeiten umgehen.

Die Gemeinschaftszuständigkeit auf dem durch das ÜWTO berührten Gebiete ist weiterhin beschränkt. Einerseits wird das prätorische Recht die Transportdienstleistungen betreffend im Abs. (6) UA 3 vertraglich festgeschrieben. Diese Dienstleistungen fallen also ganz eindeutig nicht unter die GHP.[115] Andererseits konstruiert der Vertrag im Abs. (5) UA 3 und Abs. (6) UA 2 einen neuen Begriff für Ausnahmen und Sonderregime, und zwar die horizontalen Abkommen. Sie bilden eine vertraglich festgelegte, und zwar obligatorisch[116] gemischte Zuständigkeit, d.h. ein weiteres Element der richterlichen Rechtsschöpfung hat seinen Weg in den Vertragstext gefunden. Die systematische Auslegung, nach der es hier um solche Abkommen geht, die „neben dem Dienstleistungsverkehr und den handelsbezogenen Aspekten des geistigen Eigentums weitere Materien umfassen müssen",[117] finde ich nicht beeindruckend. Ich sehe in diesem speziellen Regime nur eine weitere Sicherung oder Festigung der aus dem gesamten Vertragswerk folgenden gemischten Kompetenzen. Da hier von solchen Dienstleistungen die Rede ist, deren volle Harmonisierung auf einer gemeineuropäischen Ebene sowieso ausgeschlossen ist, sie fallen also auf keinen Fall unter Abs. (1), deshalb folgt nach der Begründung des WTO-Gutachtens, eben aus der unvollständigen Harmonisierung, eine parallele Zu-

[114] Ebenso Herrmann, CMLR 2002, 24; Eine andere Begründung bei Krenzler – Pitschas, EuR 2001, 453.
[115] Herrmann, CMLR 2002, 22; Krenzler – Pitschas, EuR 2001, 457 f.
[116] Herrmann, EuZW 2001, 272; ders. CMLR 2002, 21.
[117] Krenzler – Pitschas, EuR 2001, 453 f.

ständigkeit der Gemeinschaft und der Mitgliedstaaten. Die hier dargestellte Logik findet ihre Rechtfertigung in einem anderen systematischen Argument, nämlich im Abs. (6) UA 3. In diesem UA sind auch nur die Dikta des WTO-Gutachtens wiedergegeben, aber ihre Wiedergabe fanden, aus welchem Grund immer, die Vertragsparteien notwendig.

III. 3. 3. Der Verfassungsvertrag

Der neue Verfassungsvertrag fasst die systematische Stellung der GHP neu, ordnet sie in das auswärtige Handeln der Union (Teil III, Titel V) ein, und zieht damit auch die Konsequenzen der früheren Praxis, die Notwendigkeit der gegenseitigen Unterstützung der verschiedenen Mittel der auswärtigen Politik[118] – z.B. Embargomaßnahmen.[119]

Der EVV kodifiziert die Ausschließlichkeit der GHP [Art. I-13 Abs. (1) lit. e)], und damit verfestigt das schon zum *aquis* gehörenden Prinzip. Durch die Kodifizierung der ausländischen Direktinvestitionen [Art. III-314, III-315 Abs. (1)] wird die Ausschließlichkeit auch auf diesen Bereich ausgedehnt, und damit eine größere Kongruenz zwischen den handelspolitischen Materien, praktisch den Regelungsbereichen des WTO-Rechts, und der gemeinschaftlichen Kompetenzen erreicht.[120]

Das den Vertrag von Nizza prägende Parallelitätsprinzip wurde teils durchgebrochen, teils aufrechterhalten. Eine Entscheidung über Maßnahmen, die im Innenbereich eine Einstimmigkeit erfordern, kann im Außenbereich ebenso nur einstimmig getroffen werden. Die Aufhebung der Parallelität ist aber im Hinblick auf Direktinvestitionen zu bemerken: die EG verfügt über keine solche Zuständigkeiten im Innenbereich, aber nach dem EVV disponiert sie darüber *in foro externo*.[121]

Das Sonderregime für „Abkommen im Bereich des Handels mit kulturellen und audiovisuellen Dienstleistungen, Dienstleistungen im Bereich Bildung sowie in den Bereichen Soziales und Gesundheitswesen" – also für die sog. horizontalen Abkommen – wurde auch geändert. Der Vertragsschluss wurde durch die Abschaffung der vertraglichen Vorschrift der obligatorisch gemischten Abkommen auf diesen Gebieten[122] vielfach vereinfacht, da die zeitraubende mitglied-

[118] Zu den Gefahren der Unterordnung der GHP unter die außen- und sicherheitspolitischen Zielsetzungen, Monar, Aussenwirtschaft 2005, 106 ff.; Krenzler 2004, 390.

[119] Hierzu Herdegen, Rn. 373 f.

[120] Krenzler 2004, 391; Streinz/Ohler/Herrmann, S. 101.

[121] Krenzler 2004, 391 f.; Monar, Aussenwirtschaft, 113.

[122] Natürlich ist nur von solchen Abkommen die Rede, die in sich in erster Linie handelspolitisch geprägt sind, also der GHP unterfallen, aber die speziellen Gebiete der Kultur usw. betreffen. Streinz/Ohler/Herrmann, 102 f.

staatliche Ratifikation nicht mehr erwartet wird.[123] Das war also ein Fortschritt.[124] Die mitgliedstaatlichen Interessen sind zwar durch die Einstimmigkeit gesichert, die Anwendung der Einstimmigkeit hängt aber von zwei disjunktiven Voraussetzungen ab. Die Aushandlung und der Abschluss der Abkommen werden einstimmig beschlossen, wenn sie entweder „die kulturelle und sprachliche Vielheit" Europas beeinträchtigen, oder die mitgliedstaatliche Organisation der Dienstleistungen des sozialen, des Bildungs- und Gesundheitssektors „ernsthaft stören", eventuell die mitgliedstaatliche Verantwortlichkeit die Erbringung dieser Dienstleistungen betreffend beeinträchtigen können. Diese Gummiklauseln mit ihren juristisch kaum fassbaren Kriterien sind eher Mittel der Festigung der Einstimmigkeit. Sie öffnen also nicht Tür und Tor für die Vereinfachung der Beschlussfassung und bringen keinen mitgliedstaatlichen Gewichtsverlust mit sich.[125]

Mit dem Scheitern des EVV lassen die Änderungen noch auf sich warten.

IV. Zusammenfassung

Die Mitwirkung der EU in der WTO hängt grundsätzlich von zwei rechtlichen Bedingungen ab. Da die WTO eine internationale Organisation ist, wird einerseits das Vorhandensein der völkerrechtlichen Rechtsfähigkeit der EU/EG erwartet. Diese ist im Falle der EG mit Rücksicht auf die vertraglichen Bestimmungen ohne weiteres festzustellen. Die Rechtspersönlichkeit der EU ist eher bestritten und die Klarstellung mit dem Scheitern des neuen EVV wartet noch auf sich.

Die andere notwendige rechtliche Voraussetzung ist die konkrete Fähigkeit, Kompetenz, Zuständigkeit der EU/EG in die zum Abschluss des WTO-Übereinkommens nötigen vertraglichen Verpflichtungen einzugehen, also das *treaty-making power*.

Diese Kompetenz kann entweder aus expliziten Bestimmungen des EG-Vertrages folgen oder, als implizite Annex-Kompetenz, aus der Notwendigkeit der effektiven gemeinsamen Ausübung der übergebenen internen Kompetenzen.

Die auswärtigen Zuständigkeiten sind entweder ausschließlich oder mit den Mitgliedstaaten geteilt; ob diese Teilung Parallelität oder Konkurrenz bedeutet, ist eine andere Streitfrage.

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[123] Monar, Aussenwirtschaft 2005, 114.
[124] Krenzler 2004, 392.
[125] Monar, Aussenwirtschaft 2005, 114. Krenzler 2004, 392.

Die rechtsschöpferische Tätigkeit des EuGH hat den Wirkungsbereich der gemeinsamen auswärtigen Politik extensiviert. Deshalb hat die Kommission während und nach der sog. Uruguay-Runde logischerweise den Standpunkt vertreten, dass die ausschließliche Gemeinschaftszuständigkeit die vom ÜWTO geregelten Fragen erfasst. Der EuGH hat in seinem Gutachten eine andere Ansicht befolgt und ist in seinem Entscheid zu einer restriktiven Auslegung der auswärtigen Zuständigkeiten zurückgekehrt. Die GHP umfasse nur den Warenhandel und solche Formen der internationalen Wirtschaft, die einen zu der Substanzwirtschaft ähnlichen Charakter haben. Die impliziten gemeinsamen Kompetenzen können weiterhin nur dann Grundlage einer auswärtigen Tätigkeit sein, wenn die Zuständigkeit *in foro interno* völlig ausgeübt wurde.

Ausschließliche Gemeinschaftszuständigkeit liegt nicht vor, da das ÜWTO nur im Rahmen eines gemischten Vertrages abzuschließen sei.

Nachträglich wurde in Amsterdam, in Nizza und zuletzt in Rom versucht das Fiasko zu überwinden. Das in Nizza geschaffene Vertragswerk bietet durch seine abstruse sprachliche Fassung eher Kompliziertheit als Effizienz. Das Sisyphos Metapher[126] die GHP betreffend ist leider mit dem Scheitern des EVV stichhaltiger geworden als je zuvor.

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[126] Herrmann, CMLR 2002, 7.

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RESÜMEE

Die Einbeziehung der Europäischen Union in das Welthandelsrecht und ihre Mitwirkung in der WTO

ATTILA VINCZE

Die Studie untersucht die Mitgliedschaft der Europäischen Union in der WTO, und – in diesem Rahmen als Voraussetzung weiterer Analysen – die Union und die Gemeinschaft als Rechtssubjekte des Völkerrechts. Es wird festgestellt, dass diese Eigenschaft der Union trotz der etwas irreführenden Formulierung im EU-Vertrag und der ähnlich bedenklichen gemeinschaftlichen Praxis nicht festgestellt werden kann. Durch die Verzögerung der Ratifizierung der europäischen Verfassung wird diese auch weiterhin hinaufgeschoben.

Eine andere völkerrechtliche Voraussetzung der Teilnahme der Union in der WTO, ist die treaty-making power, damit die Union sich vertragsrechtlich verpflichten kann, was genau so gut den expliziten Bestimmungen der Gründungsverträge, wie den impliziten Annex-Kompetenzen entspringen kann – wie dies auch bei anderen föderativen Staaten zu sehen ist.

Die außenpolitischen Kompetenzen sind entweder ausschließlich oder auf irgendeine Weise (parallel bzw. konkurrierend) mit den Mitgliedstaaten geteilt.

Nach der zur Gründung der WTO führenden Verhandlung in Uruguay tauchte die Frage auf, ob die Gemeinschaft selbständig oder mit den Mitgliedstaaten

zusammen zum Abschluss bzw. zur Ratifizierung des Vertrags berechtigt ist. Der diesbezügliche Meinungsunterschied führte dazu, dass das Gericht im Auftrag der Kommission das Gutachten Nr. 1/94, das so genannte WTO-Gutachten erstellte. Darin legte das Gericht – abweichend von seiner früheren Praxis – die Kompetenz der gemeinsamen Handelspolitik sehr eng aus. Es konzipierte den Handel grundsätzlich als Verkehr von vergegenständlichten Gütern, woraus wiederum folgte, dass im Bereich der Dienstleistungen (GATS) und des geistigen Eigentums eine sehr stark eingeschränkte gemeinschaftliche Kompetenz festgelegt wurde. Infolge dessen war die Gemeinschaft nur zusammen mit den Mitgliedsstaaten, also mit geteilter Kompetenz berechtigt, den Vertrag zu unterzeichnen.

Die Verträge von Amsterdam bzw. Nizza, und unlängst der Verfassungsvertrag von Rom unternahmen zwar den Versuch das Fiasko zu überwinden, aber wegen des zweifelhaften Ausgangs des Verfassungsvertrags werden die nicht genügend effizienten und sprachlich schwer verständlichen Bestimmungen des Vertrags von Nizza noch lange Zeit den von der Mitgliedschaft in der WTO grundsätzlich betroffenen handelspolitischen Rahmen bestimmen.

SUMMARY

The Involvement of the European Union in the Law of World Trade. European Union Participation in the WTO

ATTILA VINCZE

The essay examines the membership of the European Union in the WTO and in that context asks the question, whether the Union and the Communities are subjects of international law. The relevant provisions of the Treaty on the European Union are not sufficiently unequivocal and the relevant Community practice has not been consistent enough, nevertheless it is impossible to answer this question in the affirmative in case of the Union, and now that the ratification of the Treaty establishing a Constitution for Europe is being postponed, we still have to wait for the definite answer. There is another precondition to the European Union's membership in the WTO: the treaty-making power. Such a power could be derived either from the explicit provisions of the Treaty establishing the Community (as in case of other federative states), or it could be deduced from implicit annex powers.

In the field of foreign policy, powers are either exclusive or shared with the Member States. They can be parallel or be of a competitive character. Following the Uruguay Round, which had led to the establishment of the WTO, the question arose, whether the Community has the right to sign the Treaty with the WTO and ratify the related documents alone or along with its Member States. As there was a conflict of opinions, the European Commission requested the European Court of Justice to formulate an advisory opinion (1/94). In that opinion the Court departed from its earlier policy and gave a rather restrictive interpretation of the Union's common commercial policy. The Court defined it mostly as trade with physical goods. Consequently, the Community powers in the area of services (regulated by the General Agreement on Trade and Services/GATS) and intellectual property have been defined within rather narrow limits. Hence, it follows that the Community was authorized to sign the Treaty only together with the Member States, within shared competence.

The framers of the Treaty of Amsterdam, the Treaty of Nice and, most recently, the Constitutional Treaty of Rome, did everything in their power to make good that fiasco. Due to the mixed reception of the European Constitution, it will be the not sufficiently efficient and linguistically difficultly understandable provisions of the Treaty of Nice, which will still for a long time determine the framework of the common commercial policy.

CHINA'S LEGAL ENVIRONMENT OF INTERNATIONAL TRADE IN SERVICES[1]

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I. An overview of China's legal environment

China has established a legal structure to regulate its market economy, which should be able to keep up with the pace of economic globalization.

China's economy is now a market economy (we call it a socialist market economy). As far as its nature is concerned, the socialist market economy is a kind of legal economy, thus the legislative bodies, such as the People's Congress of China and other competent governmental bodies have paid a deal of attention to and accomplished much fruitful work on legislation. China began its economic reform in 1978, after adopting a policy of opening to the world. Since then, with the transformation of the economic regime from a planned economy to a planned commodity economy, and now to market economy, China has been strengthening its legislation, most notably the legislation in the field of economy, including the legislation in international economic co-operation. The legal environment here refers to the environment created by laws, regulations, rules and other measures issued by the central government, as well as by sub-national authorities (hereinafter referred to as „laws"). On the whole, a legal framework covering every main field of the socialist market economy has been set up, and the law of international trade in services is uniformly enforced in China.

II. China's legislation on international trade in services

As it can be seen in the Genera! Agreement on Trade in Services (GATS), international trade in services generally occurs in four ways: cross-border supply, consumption abroad, commercial presence and presence of natural persons. Since commercial presence is in close relation with international investment, China's foreign-related investment laws will be examined in the underlying paragraphs.

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[1] China here refers to Chinese mainland.

1. Overview

China has sped up the legislating of international trade in services. In order to be in comply with its commitments in GATS, some major laws were revised just prior to and shortly after China's accession to the WTO. The following are major laws, which have substantial influence on China's legal environment of trade in services.

The most important law is the Foreign Trade Law (adopted in 1994 and revised on April 6, 2004). It is the basic law regulating international trade in services. „Foreign trade" in this law refers to import and export of goods and technologies, and the international trade in services.

The National People's Congress and its standing committee have issued laws in every main field of international trade in services, among others including Maritime Law (enforced on July 1, 1993), Law on the Commercial Bank (adopted on May 10, 1995, revised on December 27, 2003), Insurance Law (valid from October 1, 1995), Law of Securities (valid from July 1, 1999), Law on Advertisement (adopted on October 27, 1994), Law on Lawyers (valid from January 1, 1997, and revised on December 29, 2001), Law on Civil Aviation (valid from March 1, 1996), Law on Registered Accountants (adopted on October 31, 1993), Company Law (valid from July 1, 1994, and revised on December 29, 1999), and another one that is worth mentioning is the Law on Income Tax of P.R.C. for Enterprises with Foreign Investment and Foreign Enterprises (adopted by NPC in 1991).

As far as the regulations, rules and other measures at both the central governmental and sub-national level are concerned, most fields of international trade in services are covered. Among those rules included are those for the implementation of the above-mentioned laws on international trade in services, and other regulations, provisions, administrative measures, notices, including the fields, which have not been regulated by the National People's Congress and its standing committee. It is said that just prior to China's accession to the WTO at the end of 2001, more than 300 laws, 800 administrative regulations and more than 30,000 rules and other measures had been promulgated since 1979. Many of them were phased out or revised due to their contradiction with China's commitments to the WTO. In order to have a good understanding of China's legal environment of trade in services, I would like to mention some important regulations and rules. These are the Provisions on Guiding Foreign Investment Directions, the Catalogue for the Guidance of Foreign Investment Industries, the Provisions on Administration of Foreign Investment in the Road Transport Sector, the Provisions on Foreign Investment in the Civil Aviation Industry, the Regulations on Administration of Foreign-funded Financial Institutions, the Measures on Trial of Foreign-Invested Merchandising Enterprises, and the Provisions on Administration of Foreign-Invested Telecommunications enterprises.

On international level, the General Agreement on Trade in Services is now binding on China. In the Protocol on the Accession of the P.R.C, one of China's obligations is to apply and administer in a uniform, impartial and reasonable manner all of its laws, regulations and other measures of the central government, as well as local regulations, rules and other measures issued or applied at a sub-national level, pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange. Recently China entered into the Mainland/Hong Kong Closer Economic Partnership Arrangement (CEPA), which annulled some restrictions on regional trade in services.

2. Major points of China's law on trade in services

In 2001, when China became a member of the WTO after 8 years of hard negotiation, the country entered into many commitments on trade in goods, services and trade-related aspects of intellectual property rights. During the last 2 years or even more than that, after China's entry into the WTO, the Chinese government strictly complied with the WTO rules to revise laws and regulations, to expand the open area and to fulfill its commitments. China was advancing step by step in terms of free trade in both goods and services. Trade in services was further opened to the outside world, and the policy became more transparent. The legal environment of trade in services can be summarized as follows:

2.1. Most-favored-nation treatment on the condition of non-discrimination

As set forth in China's newly revised foreign trade law, it shall – in accordance with the international treaties and agreements to which it is a contracting party or a participating party – grant the other contracting parties or participating parties, or on the principle of reciprocity grant the other party the most-favored-nation treatment or national treatment in the field of foreign trade. As a general principle, China will render foreign services and service suppliers the most-favored-treatment, but China may also maintain measures inconsistent with that, provided that the measure is recorded in the List of Exemptions annexed to the Protocol, and meets the conditions of the Annex to the GATS on Article II Exemptions, which covers sectors or sub-sectors of maritime transport, international transport, freight and passengers. China is also under no obligation to render the most-favored-nation treatment and non-discrimination to international services made possible by the free movement of natural persons.

Unless otherwise provided for in the above-mentioned Protocol, foreign individuals and enterprises, and foreign-funded enterprises shall be accorded treatment no less favorable than that accorded to other individuals and enterprises, regarding the prices and availability of services supplied by national authorities and public or state enterprises.

2.2. China's legal environment has become transparent

Nowadays, only those laws that are published and readily available to other WTO members, individuals and enterprises, shall be enforced. China used to have interior documents or take nonpublic measures to regulate the economic order. This kind of law isn't binding anymore in China.

2.3. Market access of foreign services and service suppliers

The international trade in services shall be carried out in compliance with the provisions of the Foreign Trade Law and other relevant laws and administrative regulations. China's laws bear the unique characteristic of opening the doors to the outside world and developing foreign trade. Yet, with regard to the market access in the fields of trade in services, China takes a policy of gradual liberalization.

China made specific commitments in the Schedule covering sectors and subsectors, including business services such as professional services, computer and related services, real estate services, other business services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, tourism and travel related services, and transport services. In the Schedule of specific commitments, generally speaking, there is no limitation on cross-border supply services and consumption abroad. China does not require the presence of natural persons, except as indicated in Horizontal Commitments. As to the services connected to commercial presence, some are limited only to the establishment of joint ventures, and some have geographic restrictions within certain specific periods of time. (This is outlined in the following paragraph of the section). In the Schedule of Horizontal Commitment, it is stipulated that the proportion of foreign investment in an equity joint venture shall be no less than 25 per cent of the registered capital of the joint venture. The conditions of ownership, operation and scope of activities, as set out in the respective contractual or shareholder agreement, or in a license establishing or authorizing the operation or supply of services by an existing foreign service supplier, will not be restricted to a greater extent, than the restrictions existing from the date of China's accession to the WTO. As to the presence of natural persons, China has no restrictions, except for measures concerning the entry and temporary stay of natural

persons, who are managers, executives and specialists defined as senior employees of a corporation of a WTO Member, as well as some regulated service sales-persons. The former shall be permitted entry for an initial stay of three years, the latter are limited to a stay of a 90 days.

According to the Catalogue for the Guidance of Foreign Investment Industries, foreign investment projects are classified into four categories: encouraged, permitted, restricted and prohibited. Encouraged projects include, among others: *1.* projects for new agricultural technology, comprehensive agricultural development and projects for energy, transportation and key raw materials industries; *2.* projects for new and high technology, advanced applicable technology, which can improve the performance of products and increase the techno-economic efficiency of enterprises or produce new equipment and new materials that domestic capacity cannot supply; *3.* projects that can promote the quality of products, enter new markets or strengthen the competing capability of products in the international markets; *4.* projects adopting new technology and new equipment for saving energy and raw materials for comprehensive utilization of resources, and for prevention of environment pollution; *5.* projects that can make full use of manpower and resource advantages in the mid-west region and are in accordance with the State's policies; *6.* other cases that are regulated by laws and administrative regulations. Restricted industries: such as banks, finance companies, trust investment companies, insurance companies, security companies, construction and operation of networks of gas, heat, water supply and water drainage etc. Prohibited industries can be summarized as: *1.* projects that endanger the safety of the State or damage social and public interests; *2.* ...pollute the environment, and destroy natural resources or impair the health of human beings; *3.* ...occupy large amounts of arable land, unfavorable to protection and development of land resource; *4.* ...endanger the safety of military facilities and their performance; *5.* ...adopt the unique craftsmanship or technology of Chiona to make products.

To be specific, the following are prohibited: construction and operation of power network; companies of air traffic control, companies of postal services; futures companies; educational industries for basic education (compulsory education); business of publishing, producing, master issuing and importing of books, newspapers and periodicals; radio stations, TV stations, radio and TV transmission networks at various levels. In some industries, forms and percentage of capital are also limited. For example, the development of parcels of land; medical treatment establishments; educational institutions for senior high school students; advertising services; telecommunication services; life insurance companies. In some industries, the percentage of shares is limited. For example, securities companies, foreign service suppliers now are permitted to establish joint ventures with foreign investment up to 33% to conduct domestic securities business management investment funds. In 2005, foreign investment shall be increased to 49%.

According to the newly revised Foreign Trade Law, the authority responsible for foreign trade under the State Council (now notably the Commerce Ministry) together with other relevant authorities under the State Council shall, in accordance with the Law and other relevant laws and administrative regulations, determine, adjust and publish the market access list of international trade in services.

2.4. National treatment of foreign services and service suppliers

With respect to international trade in services, China shall, in accordance with the commitments made in international treaties or agreements, to which the People's Republic of China is a contracting party or a participating party, grant the other contracting parties or participating parties national treatment.

According to China's commitments in the Schedule to GATS, there are no limitations on foreign services and service suppliers either by cross-border supply or by consumption abroad. The services supplied that way are given national treatment. On the other hand, generally, there is no commitment to the services provided by way of the presence of natural persons. As to the services taking the form of commercial presence, most of the sectors and sub-sectors listed in the schedule of specific commitments have no limitations on national treatment, only with the exception of some of the sectors and sub-sectors listed there, such as financial services, construction and related engineering services.

China may impose restrictions and prohibitions on international trade in services in order to safeguard state security, public interest or public morals, to protect health or security, the environment, to establish or accelerate the establishment of a particular domestic service industry, to maintain the balance of international payment by the state, and in other situations set forth by laws and administrative regulations, and by international treaties or agreements, to which the state is a contracting party or a participating party.

III. Some problems relating to the enforcement of laws and further liberalization of international trade in services

Although there are numerous laws, regulations, rules and other kinds of administrative measures, quite a few sub-sectors have not yet been regulated due to the absence or lower development of those services in China. For example, regulations on services provided by midwives, on market research and public opinion polling services have not been promulgated, as far as I know. Some laws enacted are not easy to implement, due to a lack of skill. The legislative level of many laws is not high enough to successfully enforce them all over China. In fact, there are even some contradictions between them. There are

many authorities responsible for foreign trade in services under the State Council. For example, the China Banking Regulatory Commission, the China Securities Regulatory Commission, and the China Insurance Regulatory Commission. They are all in charge of the administration of foreign trade in financial services across the entire country, but their policies are not always in conformity with each other. The administrative measures, most notably those taken by lower-level local governments, are not always transparent enough, sometimes even not in accordance with the laws.

Many developing countries are not active in opening their service trade markets to the outside world, because some sectors are very important to the safety of nations and the national economy. China's international trade in services is still relatively underdeveloped, and the level of free trade in services can still be raised. This can be seen from the commitments in the Schedule. As mentioned above, China's policy relating to international trade in services aims at gradual liberalization. Therefore, China has made no commitments in many sectors or sub-sectors pertaining to areas, such as research and development services, health related social services, as well as recreational, cultural and sporting services. These will be opened step by step to the world. On the whole, China will fulfill its WTO obligations, it already follows a policy of expanding the opening to the outside world, developing foreign trade, including foreign trade in services.

MARKET PROCESS REFORM OF CHINA'S LAND SYSTEM AND ITS LEGAL PROBLEMS[1]

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I. Market process reform of China's land system

1. The land system prior to economic reform

The reforming of China's land system began with the founding of the People's Republic of China. After most of the land had been distributed, a new land system was implemented, based upon the idea that „every cultivator has the right to own his field". According to the „Law of the Land Reform", promulgated by the central government in 1950, two kinds of land were to be expropriated from the landowners: the land including kulak's leasing land exceeding that furrowed by the landowner, as well as the land cultured by employees. Expropriated land was given to the peasants, who owned little or no land. Meanwhile, the former landowner was allowed to keep some land to earn his own living. The village's land reform liberated the village's productivity. The „Law of the land reform" also stipulated that great forests, large water conservation projects, great brine pans, great wastelands, mines, lakes, luster, rivers, and ports were all to be confiscated by the government. Because state-owned land in the suburbs was used for agriculture, the farmers were obliged to pay an agriculture tax to the government instead of rent for the land. By late 1952 and the early 1953, with the exception of a few regions, the task of the land reform had been largely accomplished. On the mainland of China, the coexisting land tenure of state-owned land and private land was formally established. The „Law of the land reform" stipulated that the farmers have the right to manage, buy, sell and rent the land.

In February 1953, the Central Committee of the Communist Party of China promulgated „The Resolution on Mutual-Aiding Cooperatives of Agriculture", leading farmers to carry out agricultural cooperation, which is the elementary agricultural production cooperatives organization, in which the simple agricultural labor mutual aiding developed to land convergent management, and the division of land became a simple question of melon cutting. The elementary

[1] China here refers to the People's Republic of China.

agricultural production cooperation reserved farmers' land ownership. Nevertheless, the land was no longer managed by individual farmers, but by the agricultural cooperative collectively. The exertion of land ownership was limited. „The notice of task on transferring of country land and deed tax" stipulated that the government should use administrative means to limit the buying, selling and hocking of farmers' private lands.

The third session of the First National People's Congress of June 1956 adopted „The Demonstrating Rules on the Senior Agricultural Production Cooperatives." It was stipulated in Article two that the private means of production belonged to the cooperatives. Until that time, the primary means of production, like private land of farmers, was transferred into collective ownership. Collective ownership was ascertained formally.

Before 1990, state-owned land was handed over to land-usage units in the form of gratis transfer without any time limit, and the land-usage units did not need to take any economic responsibility towards the nation, except making use of and protecting the land reasonably and legally. To use newly expropriated state-owned land, originally used by other unit, the land-user only needed to pay certain amount of money to the original owner, or original user, and did not assume economic responsibility towards the state.

Since 1956, China has implemented the collectively unanimous managing land-usage system, and the collective became the basic unit of agricultural production and income.

2. Market-oriented change of the land system subsequent to economic reform

In 1979, China commenced its reform of the economic system, and gradually carried out a market-oriented reform of the land system. A „Land Related-Output Contract Management Responsibility System" was carried out. The original collective-owning and collective-using system was transformed into a collective-owning and individual-using system.

Beginning in 1982, China began to implement the repaying land-usage system for foreign businessmen. In 1986, the reform of the state-owned land-usage system began. In 1987, ShenZhen City led off the experimental unit of remitting state-owned land with repayment. On September 9, 1987 ShenZhen City leased a piece of land with an area of 5321.8 square meters to a company for a term of 50 years. This was the first case of remising state-owned land with repayment since the PRC. was founded, which marked the beginning of the market-oriented reform. Nowadays, the system of state-owned land usage and remising with repaying has already been implemented across all of China.

China has carried out the system of separation of ownership and of state-owned land. In case of the unchangeable land ownership, the Right of Use of a Land is allowed to be transferred, what enables state-owned land resources to realize reasonable collocation according to the rules of the market.

„The General Rules on Civil Law" adopted in 1986 contained concrete rules about the relationship between ownership and the Land Use Right. The land, as a huge social fortune, was brought into the system of civil and commercial law. The land ownership and the transfer relation became an object regulated by civil law. The „Land Administration Law of PRC." adopted by the 6th People's National Congress in 1986 regulated possession of the land, its use, management, protection and all kinds of social relationship, which symbolize the new era of the land legal system.

In order to meet the needs of China's Reform and Opening policy, China needs to further develop its land-using system, and to attract foreign investment in this area. On 19th May 1990, the state council promulgated „The Provisional Rules on Remising and Transfer of the Right of Use of State-owned Land in China City And Country" and „The Provisional Management Rules on Foreign Capital in Developing and Managing Large Area Land", which symbolized that China's land-usage system had entered a new era.

The revision of the Constitution in 1998 modified the provision from „Any organization or individual should not occupy, buy and sell, rent or transfer land illegally in other forms" into „The Land Use Right can be transferred in accordance with the law". The revision of the Constitution provided the basis for the reform of the land-usage system. Accordingly, the standing committee of the National People's Congress also amended the „Land Administration Law". Certain provinces and cities also issued numerous local regulations on the transfer of the Land Use Right with repaying, stipulating the method, the conditions, the procedure of the transfer, and the rights and obligations of the parties.

Besides the land-use system connected with repaying, the traditional system of transfer still prevails in areas, where the land was bought and used without repaying.

II. Issues relating to urban state-owned use of land

Section 9 of „The Constitution of the People's Republic of China" stipulated: „Mines, rivers, forests, mountains, grasslands, wastelands, shoals and other natural resources, all belong to the state, they constitute the whole nation's ownership, except forests, mountains, grasslands, wastelands, shoals belonging to the collectives stipulated by the laws." Section 10 stipulates that: „the city's land belongs to the nation." On grounds of public policy the state can expropriate the collective's land in accordance with the laws". „The implementing law

of the land management law" (98. 12. 27.) stipulated in its 2nd Article: The following land belongs to the whole nation, it is owned by the state: the land in the city, confiscated, expropriated land, or acquired by purchase. Land, such as forests, grassland, shoals, which do not belong to the collective, the land originally belonging to the members of the collective, who later transferred the land to city and county citizens, the land originally belonging to moving farmers, who did not use it after moving away, because of the transmigration organized by the nation or because of natural disasters.

Though state-owned land belongs to the nation, under general circumstances it is not used and managed directly by the nation, but by the government, and used by the unit and the individual. The 9th Article of the „Land Administration Law" stipulates: „The state-owned land and the farmer collective land can be given to the unit and to the individual according to the law..." The 15th Article stipulates: „The state-owned land can be managed by the unit and the individual engaging in planting, forest, stockbreeding and fishery production."

The system of use and transfer of city and county land with repaying constitutes a part of the economic reform in China. The system of use carried out prior to the Reform had many disadvantages. The land user did not need to calculate the cost of using the land, which led to serious wastage of land. On the one hand, the nation loses the great income of land resources, on the other hand, building the city's basic infrastructure requires more money. Certain land-users transfer the land bought without repay-obligation privately and with repaying. This leads to land speculation. This kind of land use system is unreasonable. The system of use and transfer of city and county land with repay can avoid the disadvantage of the system of land use without repayment, retrench land-using and put an end to the concealed land bargaining and add to the fiscal income. The market economy system has to have a consummate land market to realize the reasonable collocation of land resource. Under Chinese law, buying and selling land ownership is forbidden. According to „The Temporary Rules on the Remising and Transferring of the State-Owned Land Use Right", the Land Use Right can be exchanged. The dealing object in the land market is the Land Use Right. State-owned land acquired by the buyer, belongs to iura in re aliena. During the contracting period, the land user has the right to use the land.

By way of the transfer of the state-owned Land Use Right, the government implements the system of the nation's land monopolization (the nation monopolized the first market level of the land), and remises the state-owned Land Use Right via the city or county government. The accepting party pays the money and acquires the Land Use Right. The two parties sign the Land Use Right remising contract and stipulate their rights and obligations. The accepting party uses the state-owned land according to the contract during the period stipulated therein. This is the remising of Land Use. The remising contract is

signed by the land administration of the city or country government. The remising period of the Land Use Right was confirmed according to the following purpose:(1) Dwelling land: 70years; (2) Industrial land: 50 years; (3) Educational, science and technology, culture, sanitation land: 50 years; (4) Commerce, junketing and entertainment land: 40 years; (5) Colligation or other land: 50 years.

The remising of the Land Use has great significance. The remising of the Land Use Right can secure effective use of the state-owned land, prevent the loss of national assets, enable the land-user to use the land according to the land-layout and prevent land speculation. China has also established the land storing system, in order to ensure the profit of the nation as the owner of state-owned land, to regulate the land market and to control the market price of the land.

The ways state-owned land can be sold are the following: by agreement, by inviting bids, by auction and by listing for granting. Selling the land by agreement means that the buyer, who wants to acquire the ownership of the land, directly expresses his wish to the local governments of the county or the city that represents the nation. Provided that no third party takes part in the „competition" to acquire the land, the government as the seller has the tendency to let the buyer reach the agreement by consultation. This is the way the state sells land to individuals. As it can be seen, the state does not make use of the possibility of requiring the offerors to compete with each other, which causes the price of the land to be very low. This means that this method is just perfect for governmental projects, public welfare, non- profit units or projects, and some other cases, where the government considers it necessary to give certain support. Selling land by inviting bids refers to the case, when in a required period of time the bargainer issues a bid invitation bulletin to invite citizens, legal persons and other organizations to make bids to the seller in order to acquire the land. In these cases the seller has the right to choose the best offer. Selling by auction roughly means that the land keeper issues an auction bulletin, and the competitors make the offer openly in the required time and at the required place. The buyer will be determined according to the „winner with the highest price" principle. Selling by listing for granting refers to the cases, when the owner of the land hangs out his shingle and the exchanging conditions in the exchange center of the land, and announces basic information about the land and its terms of use. Possible buyers in this case as well make their offers during the established time limit, and the buyer will also be determined according to the „winner with the highest price" principle. As it can be seen, the last three methods mentioned above have all introduced the notion of competition.

The buyer of the land can transfer, rent, and mortgage the land. The transfer of the Land Use Right belongs to the second market of land transfer. Only by allowing the transfer of the Land Use Right, can the land market be established. The transfer of the Land Use Right refers to the land user's right of re-transfer of the land, including selling, exchange and conferring. The Land Use Right cannot be transferred, if the land has not been exploited according to the period and conditions stipulated in the Land Use Right transfer agreement. The practice of buying and afterwards re-selling the land with profit should be stopped. When the Land Use Right is transferred, buildings and other adhering objects should also be transferred. Renting the Land Use Right means that the land user as the lessor leases out the Land Use Right, together with the buildings and other adhering objects. The leaseholder pays the rent. After leasing the Land Use Right, the lessor has to continue to fulfill the Land Use Right remising agreement. When the Land Use Right is mortgaged, the buildings and other adhering objects are also mortgaged.

The Land Use Right means the right of occupying, using the land. Regarding its legal nature, it is a substance right. First, the Land Use Right is the right to occupy, to use the land. Secondly, the land user has the right to dispose of the land, within certain limits, namely, he has the right to transfer, lease or mortgage the Land Use Right. Thirdly, the Land Use Right only implies the active behavior of the obligee, but it does not depend on other people's active behavior. The obligee has the obligation to use the land. The Land Use Right is a Jus in re. It is the right of the land user to invest in the land, to get profit from it, and to transfer, rent, and mortgage the land. The Land Use Right differs from the single leasing and mortgageing right connected to the ownership, and it is an independent property right. The Land Use Right is a usufruct similar to the superficies, and it implies the right of the acquiring party to construct buildings and other infrastructure on the state-owned land.

III. Issues upon the country's collective land contracting management right

China started to reform the country collective land use system in the 1970s, and gradually carried out the land contracting management responsibility system, which means that the public has the ownership of the land, while the farmers have the right of management. This reform changed the Chinese rural collective management system and enables the farmers to be the basic unit in agriculture. The reform rearranged the allotment of rights between the country, the rural public and the farmers. Thus, the principle of right allotment is: „to reach enough output to transfer to the country and the public, and the rest belongs to the farmers themselves." This principle implies an encouragement, and farmers are going to work hard. As a result of this, agriculture developed at an extraordinary speed.

These land contracting management rights should be realized in the rural community (country or other agricultural economic enterprises). All members of the country are entitled to acquire the land contracting right.

Since the 1990s, the farmers' enthusiasm has vanished, because of low prices and high costs in farming, as well as low or even non-existent income. Therefore, the agricultural output has decreased, and the country's land system (land contracting responsibility system), which was considered to be the solution, turned out a failure. As a result, Chinese products on the international market are not marketable enough, Chinese agriculture will have to deal with terrible pressure after the opening of the domestic agricultural market, should ownership of public land remain unchanged, and intensive farming still remain impossible, due to high costs.

The present land contracting management responsibility system would have to meet the requirements of public interest. Farmers would need more help, the subsidies paid to them are too low. Land is the basic means of production for them, it is their guarantee for life, and only by protecting their land related rights can one stop their migration to the cities. The problem brought about by the country's land system is not just the problem of scale, or a problem of family management. It can be foreseen that farmers moving to the suburban areas of the cities will create a major problem. If the number of the suburban population increases while the industry's absorbing ability decreases, the cost of human migration will increase. This means, the migration of surplus labor to suburban areas is the key problem of promoting the efficiency of land management.

The implementation of the land usage right is different across the country. Because of this, China is trying to introduce reforms in some areas.

Meitan region (comparatively developed region) implements the means of land contracting for a long period. During the contracting period, the acreage of the land contracted is not enlarged or reduced because of a newborn baby or a dead person.

Pingdu region (comparatively developed region) implements the „double-farmland system", which stipulates that every farmer can have his own land covering his and his families needs, and the land left, is delivered to the farmer by way of a bid invitation.

Sunan region (developed region): the collective managed the land, and the farmer was usually engaged only in machining or servicing work.

Nanhai region (developed region) implemented the land-sharing cooperation system. The farmer has become a shareholder with land, and the collective gave him the land. The farmer draws extra dividends at the end of the year.

Huaihua region (less developed region) implemented forest renting for a 6 years period. The farmer and the collective collocate at a ratio of 9:1.

Yan'an region (less developed region) implemented brine-pan auction. The contracting period is 20 to 50 years. The farmers adopted it with great enthusiasm.

The levels of development in various countries in China are very different, these regions should adopt the best land system for themselves, according to their own conditions. The farmers in most regions still depend on land, this is why the Land Contracting Management System still suits most country regions in China.

The Land Contracting Management right in the different countries is a right of membership of a collective. Section 5 of the „Law on Country Land Contracting" stipulated: The member of the country's collective economic organization is entitled to contract any country land granted by the collective economic organization. No organization or individual can deprive the country's collective economic organization's member of his right, or limit his right of contracting land." Section 26 stipulated: if, within the contracting period, the whole family of the contractor moves to the city, and modifies its residence into a registered non-agricultural permanent residence, they shall return the plough contracted and the grassland to the delivering party. In case the contracting party does not return it, the delivering party has the right of taking back the contracted plough and grassland.

The land contracting management right is a property right, but it is not the property right in a traditional sense. It can be deducted from the „Law on Country Contracting Management" that the aim of the law is the stabile linking of farmers to the country land. For example, the 23rd Article of the law stipulates: the government should issue the Land Contracting Management Right Certificate to the contracting party and register it to affirm the land contracting management right. The 54th Article of the law stipulates: If the delivering party causes damage to the land-contracting party, he should be liable in tort (such as stopping trespass, returning protoplast, restoring property to original state, eliminating harm, removing danger, repaying damage). Without the approval of the country collective, the farmer cannot transfer the land contracting right privately. He has only the right to interchange, rent and subcontract. The farmer cannot transfer the obligations arising from the agreement to the collective. He does not have the right of disposal. The contracting management right is not a real right.

The country land contracting management responsibility system does not fall into the traditional theories of real rights or creditor's rights in civil law, therefore civil law has to create a new right. The Land Use Right has to be integrated into the legal system. The land-transferring system has to be established for the purpose of accelerating the reasonable collocation of country land and the transfer of country labor force. For example, the farmer has to be allowed to dispose of his land. The Country Land Contracting Management Responsibility System means that the collective, as the representative of all the landowners, delivers the land to the farmer of the same organization. The two parties sign a contract, where more articles are prescribed, and cannot be negotiated, than articles that can be objects of negotiation. The collective land ownership is limited, and the transfer of the Land Use Right is also strictly limited. The „Law on Contracting of Land" emphasizes the stability of the land use right, therefore the transfer of the Land Use Right is strictly limited. For example, though section 10 of the „Law on Country Land Contracting Management" stipulates that the contracting right can be transferred, it only allows the contractor to rent or to subcontract. If the contracting right is transferred, in the true sense of the word, the approval of the delivering party – namely the collective organization – is needed.

The provisions of the „Law on Country Land Contracting" reflect that the government interference is serious. For example, if the land contracting management right needs specific adjustment, or the country land was contracted to a person, who is not a member of the collective, the approval of more than 2/3 members of the organization and the country (grass roots-government) government is needed.

The law strictly protects the farmer's land contracting right. The farmer has the right to give up the contracting right. He has the right to give it up at the beginning or in the course of contracting. The collective can reverse-contract in order to prevent the land from being barren. During the contracted period, the delivering party should not take the land back. If the whole family of the contracting party settles down in a city, the land contracting right can be reserved according to the willingness of the contracting party. During the contracted period, the land of the farmers should not be adjusted. If the land contracted has to be adjusted, for example because of serious damage, the procedure is strictly regulated. If the agreement stipulates that the land should not be adjusted, the agreement should be followed. The income of the contractor can be inherited in accordance with the „Law of Inheritance". If the contractor dies, his successor has the right to continue to perform the contract during the contracted period.

IV. The conflict between economic development, land protection, and legal adjustment

The contradiction between economic development and land protection is very serious in China. The main problem is that the developing areas run by the government enclose land blindly. According to statistics released in 1999, China has 2 million mu Chinese expropriated land un-used at present. Many areas do not possess means for development, thus a lot of expropriated land is unused and wasted. In some areas low-level repeated building is followed on the engrossed land. Some areas, making use of the time needed for transfer from the country to the city, or from the country to the town, reclassify agricultural land into land for construction.

China's economy has been developing quickly, and needs a great deal of land for construction. In order to accelerate the local economic development and acquire investment, some local governments by way of exceeding their authority authorize this kind of reclassification of agricultural land, or establish developing areas without the approval of government. This phenomenon is widespread. The phenomenon of „rush development of the area" in the course of economic construction leads to serious destruction of vegetation. Therefore, since 1997, the policy of freezing occupied arable land has been enforced. If arable land is used for non- agricultural construction projects a serious approval system has been introduced. The „Land Administration Law" amended in 1998, intercalated the examination and the approval system connected to the reclassification of agricultural-used land to non-agricultural-used land. Though the situation is much better nowadays, the problem has not been solved yet. In 2003, the Ministry of Land and Resources organized a survey of the national land market order. According to statistics from 10 provinces and cities, using land without approval, occupying and transferring land illegally is still widespread. The causes of this are: (1) the conflict between economic development and land protection; (2) the local government does not fulfill its administrative obligations in compliance with the law, authorizes land for construction unlawfully; (3) the local government increases its income only by selling the land; (4) local people's hope for developing the local economy and governmental officials' aim of developing the local economy to reflect their political achievements; (5) the land management department of the local government is subordinated to the local government and cannot supervise the local government effectively.

The situation of plow land in China is also rather serious. According to some 1999 statistics, China has 1.95 billions mu plow land, per capita 1.59 mu, less than half of the world per capita plow land, 3.75mu. China feeds 22% of the world population with 7% of the plow land. Besides this, 64% of the plow land

lies in the area, where water resources are scarce; 40% of the plow land in dry and sub-dry areas deteriorates to different degrees; 30% of plow land is damaged by the washing away of water and soil; 91 million mu plow land's gradient is above 25 degrees, and needs to be returned to forest and grassland. Currently, China has 0.19 billion-mu plow land that can be exploited, but is difficult to rearrange, re-cultivate, and develop due to environmental limitations.

Facing the severe conditions of the land resource and the illegal activities in the real estate market, in order to protect the land, the State Council introduced reforms in the various developing areas, banned the local governments from allowing the illegal establishment of developing areas. The first market of state land remising is especially regulated. Rules stipulate that the collective land should not be illegally remised, that the governments should only provide land according to the law, and according to the whole land use program. The government tries to perfectuate the system of regulating land usage. With regard to the second market of land conveying, it is emphasized that the right to use state land, which can be transferred without payment, cannot be used for the development of the real estate, resulting in the land entering the market covertly.

With regard to legislative protection of the land, the Land Administration Law enacted in 1998 has already formulated mature regulations for land protection. The state is in charge of the overall planning of the use of the land, regulates it, restricts the reclassification of agricultural land into land for construction, denominates the total amount of the land for construction and offers special protection for cultivated land. The reclassification of agricultural land into land for construction has to be strictly examined and approved in accordance with the law. Besides the Land Administration Law, the State Council and the National Territory Resource Department implement some rules and regulations for land protection. In 1998, the State Council enacted the „Regulations Concerning the Re-cultivating of Farmland", establishing the principle: those, who damage the land, are responsible for re-cultivating it. In 2003, the State Council revised the „Regulations on Basic Farmland Protection", which now stipulates that basic farmland is land affirmed according to the prediction of the agricultural production to meet the needs of population increase as well as those of the national economy in a certain period. Besides, „Measures on Tackling the Unused Land", „The Administrative Measures on the Annual Plan of Land Use" and so on were enacted in 1999. Thus, a sound legal system for land protection has been formed in China.

To tackle the contradiction between the economic development and land protection, China must strictly implement the land rules and regulations. But the key point of this problem is enhancing the legal concept of the district governments to exercise their authority according to the law, improving the supervision mechanism of the land, strengthening the legal responsibility of the leaders in the district governments, who have the power to approve the land.

V. Conclusion

The reform of the land system constitutes a part of the Market Economy System established in China, and is naturally the result of the Open Policy. It has changed the unreasonable land use system, accomplished the reasonable allocation of land resource and improved the efficiency of the use of the land. The paid use and transfer system of state-owned land, established a land system suitable for China, which is equivalent to the economic value of the land. The popularization of the land contracting management system in the country has solved the daily problems of nearly 1.3 billion people, and significantly improved the lives of the farmers. All this demonstrates that a reasonable system can generate people's enthusiasm for production and create great economic value. Inevitably, many economic and legal problems still have to be solved, for example the contradiction between economic development and land protection, the supervisory system of the administrative approval, the protection of farmers' rights during the expropriation of the land, the transfer of the agricultural right of use of the farmers. In addition, the already established legal system still remains to be strengthened, the system of land protection still remains to be perfected. Regulations like the „Law on Planning of State-owned Land", the „Measures on Land Rearrangement", the „Measures on the Development of Agricultural Land" should be promulgated. Generally speaking, many problems related to China's land system are still unsolved and further research is urgently needed. This paper is just an introduction, but the author hopes to attract some attention to China's land legal system.

HABILITATIO

SYMPTOMS AND FACTS RELATED TO THE QUESTION OF THE „CRISIS OF THE NATION-STATE" IN THE 1990s[1]

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Was John Dunn right noting in the preface of a collection of studies on the contemporary crisis of the nation-state that states have been in a continuous crisis since the 18th century, when the Westphalian system came into existence? Recalling the wars, revolutions, upheavals, coup d'états of the past centuries, Dunn certainly had a point. Meanwhile, the territorial state is still the most successful frame of representative democracy.

Since the great transformation in Eastern and Central Europe, the issue of the crisis of the nation-state has come back to the academic and political agenda. Globalization is making the nation-state increasingly irrelevant; on the contrary, the role of the state should be increased to counter the negative (or so perceived) effects of economic and technological globalization. Mutually excluding arguments? I personally think that while each argument has its own merits, it is too early to bury the nation-state.

Some authors point out that there is a close relationship between the crisis of the state (or certain states) and the crisis of the modern international order, i.e. the order of nation-states. Going beyond the philosophical question, whether change or transformation is a cause or effect of crisis (or dysfunction), one thing is clear at the beginning of the 21st century: neither balance of power, nor collective security systems have been able to prevent war amongst nations. Both have been managed by states. States also played and continue to play a leading role in low intensity conflicts, asymmetric wars, and of course in the ongoing war against terrorism. In times of violent conflict people blame, and at the same time expect states to do something to protect them.

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[1] This is the summary of a speech delivered by the author on 13 November 2003 at the Law Faculty of Eötvös Loránd University, Budapest, within the framework of his habilitation procedure.

International (intergovernmental) institutions and organizations failed and continue to fail to provide effective global governance – beyond the prevention of war – in a number of other significant problems affecting humanity as a whole. The blame here is also usually directed toward the state: international organizations cannot do more than the member states allow them to do. There is also some truth in such an argument; however, this point is made largely by the leaders of these organizations, when inaction or failure has to be explained publicly.

In my opinion it is not possible to answer at present in a satisfactory manner the question, whether the dysfunction of the international order is a cause or a result of the deficiencies of nation-states in general, or the behaviour of particular states.

It is possible, however, to point to some phenomena and processes that are facts on the one hand, and can be interpreted as symptoms of the contemporary crisis of the nation-state on the other hand.

1. The question of legitimate possession and use of force. Under international law only states can legitimately maintain armies and other entities that have the potential to use force; the use of force by states is regulated after all by the UN Charter, while the UN in some determined cases and under precise conditions extends this recognition to other entities, for example, groups and local organizations fighting foreign military occupation. Fact is that over the past decades the number of private entities taking part in low intensity armed conflicts and/or asymmetric wars has increased alarmingly. Both particular states and the international community of states are – seemingly – largely unable to stop the process labeled „privatization of war." Key concepts at the very foundation of the international order, like: self-help, self-defense, self-affirmation, self-determination, etc. acquire new meanings. State monopoly of force becomes more and more diffuse.

2. Defending territory was from the beginning one of the core concepts of the raison d'état. In a world which tends to reject the traditional meaning of non-interference in internal affairs and at the same time not only speculates on the concept of international humanitarian intervention/war, but has experienced its reality in a number of cases, territorial integrity of states and inviolability of its borders sounds like a mantra. Such principles belonged for decades – as the great Hungarian political thinker István Bibó put it – to the unwritten constitution of international relations.

3. Sovereignty. In Europe the idea of giving up, or to put it more mildly, delegating sovereignty or some of its prerogatives to the European Union is common sense. The erosion of sovereignty is a worldwide phenomenon, even though there are still many states advocating the idea of absolute sovereignty.

4. Corruption: no question, this is also a worldwide phenomenon, primarily affecting state organs. The most coherent, just and good-will political, social, economic and other programs elaborated at national and/or international level remain dead letters, if those supposed to implement them can be diverted by short-term self-interest. And this is reality. The mere fact that in an increasing number of countries in recent years fighting corruption has become a central issue of electoral agendas, demonstrates the seriousness of the problem – but more serious is that there is virtually no, or mere a very weak window dressing follow up.

5. Legitimacy. On the domestic level in many countries there has been much talk of a „new social contract", while on the international level the discourse is more oblique. The legitimacy of UN Security Council decisions has been questioned mostly on a procedural basis, while state action without Security Council blessing has been raised almost exclusively with regard to Unites States policies and actions. The US at least seeks Security Council approval for its most controversial actions, while a number of important international developments have never even reached the agenda of the Council. The question is: since on the domestic level the fiction of a „social compact" does not work anymore, why should it be relevant on international level? One important element of the – also fictitious – „international social compact" is the principle of pacta sunt servanda. Freely undertaken obligations must be respected and implemented in good faith. Reality indicates a different practice in important areas, starting with human rights and ending with weapons of mass destruction.

6. Citizenship. The development of international human rights and humanitarian law, multiculturalism and migration has made the distinction between "we" (citizens) and „them" (non-citizens, aliens) less relevant than before. In a number of states where national, ethnic, religious and linguistic minorities exist, multiple identities are recognized and the rights attached to particular groups and individuals belonging to such groups have been institutionalized. In Europe there is a debate whether citizenship should be a criteria for minority rights. Since such rights are regarded as an integral part of universal human rights, the practice of international fora such as the Council of Europe, is that the recognition and respect for minority rights should not be conditional on citizenship. Identities, whether regional or supranational, national, ethnic, religious, linguistic, and, in general, cultural identities and individual and group behaviour based on them sometimes come into conflict with the institution of citizenship.

7. Supranational financial transactions and operations, global trade, free capital flow „without borders" have made the notion of „national economy" increasingly difficult to interpret. The global trend is towards the minimization of state intervention in economy. Autarchy and protectionism are either impossible at this stage, or states trying to implement policies based on such principles have to pay a heavy price in terms of development and standards of living of the population.

8. New technologies, and in particular developments in communications have undermined state monopoly on information. This is well known and researched. However, the future is rather unclear as regards other fields, like genetics, robotics and nanotechnologies. There is an ongoing ethical debate (but not only) on the impacts of developments in these fields on humanity in general: for example, who should take the final decision on genetic experimentation on the human embryo? Parents, the state, international organizations, or all these within the framework of an institutionalized and legally regulated process? There are also serious political concerns related to the increasing availability of weapons of mass destruction to individuals and non-state actors (nuclear, biological and chemical weapons) due to new technologies. The notion of „poor man's nuke" regarding chemical and biological weapons is a plastic description of the situation. The monopoly of the great powers and their ability to control has also been seriously undermined in these fields in the past 15 years.

9. The number of failed states has increased in the nineties. This concept is being used regarding states, where the central government collapsed (Somalia is a classic example), or the government is unable to fulfill its functions: control of the territory, providing vital social services to the population, etc. Failed states are a constant source of regional and in some cases global instability. The present international order, that is the order of nation-states has serious difficulties in coping with the situation.

In conclusion: in my opinion the nation-state (i.e. the territorial state) continues to be the most effective known framework for democracy. Alternative proposals like global governance or decentralization (subsidiarity, devolution, administrative, territorial or cultural autonomy) coupled or not with supranational integration may work in some fields – economy, trade, protection of human rights, but, for the time being, do not provide convincing answers to a number of political questions and real processes like power sharing in culturally diverse societies, mass migration, humanitarian intervention, states and territories seriously harmed by environmental or man-made catastrophes, not to mention the question of war.

States have been instrumental in accelerating the latest phase of globalization. Therefore, states must play an effective role in balancing the positive effects and countering real and potential negative aspects of global processes, in particular in trade and economics, social justice and fundamental freedoms and rights. Most governments are aware of their responsibilities – international aid and humanitarian initiatives are a proof of this – but this is certainly not enough. The time has come for a reformulation of the existing international compact, without canceling its most basic terms.

DOCTOR ET PROFESSOR HONORIS CAUSA

HANS HOYER

Universität Wien, Institut für Rechtsvergleichung

Eure Magnifizenz,
Spektabilitäten,
liebe Kollegen,
hoch angesehene Festversammlung!

Als mir aus heiterem Himmel und ohne vorgängige, heute so weit verbreitete Indiskretion die offizielle Nachricht zuging, Ihre berühmte Universität habe beschlossen, mir das rechtswissenschaftliche Ehrendoktorat zu verleihen, war ich zunächst sprachlos. Im Geiste ging ich die Namen all derer durch, die Sie vor mir dieser Ehre würdig befunden hatten. Naheliegend, dass ich zunächst an mir nahe stehende Vertreter meiner Fächer gedacht habe, Fritz Schwind und Erik Jayme. Sollte ich, was ich bisher für unmöglich gehalten hatte, ihnen an wissenschaftlicher Bedeutung nahegekommen? In Überraschung und Stolz der ersten Stunde mischten sich alsbald Zweifel; es mussten andere Beweggründe gewesen sein, die mir die seltene und hochgeschätzte Ehre vermittelt hatten. Was konnte das gewesen sein?

Eingehende Gewissenerforschung legte den Schluss nahe, mit der mich treffenden Ehrung bedanke sich die „Eötvös Loránd Tudományegyetem" bei der Alma mater Rudolfina Vindobonensis dafür, dass die Nachkriegsgeneration an der Wiener Fakultät die von ihren Lehrern begründeten engen wissenschaftlichen Beziehungen und persönlichen Freundschaften zu den Budapester Kolleginnen und Kollegen ungeachtet aller politischen Probleme der Zwischenzeit aufrechterhalten und noch ausgebaut hatten. Dadurch sind weder das fruchtbare wissenschaftliche Gespräch noch der persönliche Erfahrungsaustausch je abgerissen; im Gegenteil, das Bewußtsein gemeinsamer Geschichte – wenn man nicht besser von tragischem Schicksal sprechen sollte – aber auch gemeinsamer donaueuropäischer Aufgaben und Zukunft verstärkte die Zusammenarbeit noch, die nie ein einseitiges Nehmen bzw. Geben war. So sei hervorgehoben, dass Österreich im beabsichtigten Aufgeben des speziellen Rechts der Handelsgeschäfte und dem Hinwenden zu einem spezifischen Unternehmensrecht dem bewährten ungarischen Beispiel folgt.

Als Beispiele der guten wissenschaftlichen und persönlichen Beziehungen, in denen meine Lehrergeneration uns ein hervorragendes und nachahmenswertes Vorbild geboten hat, möchte ich nur Szászy István und Hans Schima, Eörsi Gyula und später das berühmte Duo Mádl Ferenc und Vékás Lajos auf der ei-

nen und auf der anderen Seite, Fritz Schwind, Boytha György und Wilhelm Peter nennen. Als Schüler von Hans Schima und Fritz Schwind wurde ich bald nach meiner Rückkehr an die Wiener Fakultät als Assistent Ende der 60er Jahre in die praktische und persönliche Zusammenarbeit eingebunden. Im Rahmen des Österreichischen Juristentages und der Österreichischen Gesellschaft für Rechtsvergleichung ergaben sich viele Bezugspunkte mit der Budapester Fakultät, manchen ihrer Mitglieder konnte ich Gelegenheiten zur Publikation ihrer Arbeiten in Österreich vermitteln, darunter über die schon Genannten hinaus Harmathy Attila, Weiss Emilia und Hamza Gábor. Mein Aufstieg zum Professor brachte die Teilnahme an Tagungen und Gastvorträge in Budapest mit sich, schließlich auch die Aufnahme ungarischer Juristen als Assistenten am Wiener Institut für Rechtsvergleichung; erwähnt seien nur Lehner Katalin, Széchenyi László und zuletzt Varga (verehelichte Neudörfler) Éva. Als wichtige Verbindungen darf ich noch den aus Újvidék Ihren zugezogenen Várady Tibor und den Graz-Budapest-Wien-Studenten Tomislav Borić nennen.

Die mir zugedachte Ehre trifft somit mehr die Zusammenarbeit der Budapester und der Wiener Fakultät, als letzterer Repräsentant darf ich mich verstehen und mich herzlichst für die Auszeichnung bedanken. Sie wird ein wertvolles Unterpfand für weitere ersprießliche Zusammenarbeit darstellen, wofür ich mich persönlich verbürge.

Erlauben Sie mir noch ein persönliches Wort: in meiner Familie haben Sie an alte Verbindungen zu Ungarn erinnert, war doch der Großvater meiner Frau Hans Baron Cnobloch ab 1919 erster Gesandter der Republik Österreich in Budapest.

Lassen Sie mich auf die traditionelle Promotionsformel in Latein in dieser europäischen lingua franca academica antworten:

Pro collato honore et dignitate gradus gratias innumeras ago.

MANFRED WEISS

Johann Wolfgang Goethe-Universität, Frankfurt am Main
Fachbereich Rechtswissenschaft

Magnifizenz,
Members of the University Senate,
Mrs. Ambassador of the Federal Republic of Germany,
dear colleagues, dear guests,

I would like to thank wholeheartedly the members of the University Senate for having granted me the great honour to become a *doctor honoris causa* of the Eötvös Loránd University of Budapest. My deeply felt thanks also go to the members of the Faculty of Law for having recommended me as being eligible for this honour. I am proud to get this title from this prestigious university in a city and in a country to which I have close ties for many years.

Since the mid eighties I annually participated in Hungary in a seminar on Comparative Labour and Social Security Law. This was a unique opportunity for scholars and students from East and West to exchange ideas, to create networks and to establish an ongoing communication on issues of common concern. And in particular it was an opportunity to get rid of mutual stereotypes and prejudices: in short an excellent set-up for mutual learning. It was in this context when I got to know my labour law colleague Csilla Kollonay-Lehoczky, with whom I have been closely collaborating until today.

After the downfall of the Iron Curtain I had the great privilege to be in many ways involved in the transformation of labour law in different Central European States, in particular in Hungary. In discussions with colleagues, judges and Government officials I not only got the chance to develop a better understanding for the problems this country was confronted with, but also to learn more and more on the richness of the Hungarian history based on institutions like this 370 years old university. In this process Hungary has gained a very specific identity and culture to which I am very much attached, and which I consider to be an important asset in the extended European family. The richness of Europe – and this also applies to the project of the European Union – lies in the variety of these national cultures, which hopefully will be maintained in the future. Of course there is one element in the Hungarian culture, which is almost impossible for a foreigner to get acquainted with: the Hungarian language. I have to confess that in spite of my close affinity to your country I never succeeded to speak even some words of Hungarian: a language the sound of which I like very much, but which is just too difficult for me to be mastered. Therefore, I beg your pardon if I stand here speaking in English.

„Comparative labour law" as an academic discipline was perhaps never more important than today. Globalization and Europeanization make it impossible to treat this field merely with a domestic perspective. Borders have to be transgressed in order to learn from each other. In this trans-national discourse it is important to get a sense for the specific needs and the specific possibilities in different countries. Models, which might work elsewhere, cannot simply be transferred to other environments. The difficult task consists in finding out how to adapt the institutional framework to the specific circumstances of given countries. It is in this spirit how I understand my comparative work. This mutual learning from each other is highly gratifying for everybody involved in it. Therefore, it is with great joy and pleasure how I see the collaboration with my Hungarian colleagues in the past. The honour granted to me today will stimulate me to even more intensify this fruitful academic discourse in the future. I now proudly feel being part of your academic community. Therefore, once more I would like to thank you very much for having chosen me to become a doctor honoris causa of your university.

COMMUNICATIO

ANTRITTSVORTRAG VON PROF. GÁBOR HAMZA AN DER UNGARISCHEN AKADEMIE DER WISSENSCHAFTEN

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Am 6. Oktober 2004 hielt Prof. Gábor Hamza, Leiter des Instituts für Römisches Recht an der Budapester Eötvös Loránd Universität und korrespondierendes Mitglied der Akademie, im Vortragssaal der Ungarischen Akademie der Wissenschaften seinen Antrittsvortrag mit dem Titel *„Die Untergliederung der modernen nationalen Rechtsordnungen in Rechtsgebiete (bzw. Rechtszweige) im Lichte der römischrechtlichen Tradition"*. Die Sitzung wurde von Prof. Ádám Török, dem Vorsitzenden der Sektion für Wirtschafts- und Rechtswissenschaften der Akademie eröffnet. Ádám Török stellte nach Begrüßung der Anwesenden die wichtigsten Stationen der Laufbahn von Prof. Hamza vor, wies auf seine einzigartig reiche und weitverzweigte Verfasser- und Redaktionstätigkeit auf dem Gebiet des römischen Rechts, der Rechtsgeschichte und der Rechtsvergleichung, auf seine Mitwirkung in in- und ausländischen Organisationen, sowie seine Anerkennungen im Ausland hin. Als Ausgangspunkt des Vortrags von Gábor Hamza diente der Gedanke, laut dessen die römischrechtliche Tradition im weiteren Sinne der Gliederung der modernen Rechtssysteme zugrunde liegen kann. Zugleich ist dennoch festzustellen, daß die innere Gliederung des römischen Rechtssystems bzw. die Idee seiner wissenschaftlichen Klassifikation griechischen Ursprungs ist, und die Partition des *ius civile* nicht mit der Gliederung des Rechtssystems in Rechtszweige im heutigen Sinne gleichzusetzen ist. Der Begriff *ius civile* hat mehrere Bedeutungsschichten, denn das *ius civile* regelt sämtliche Lebensbereiche des *civis Romanus* sowohl dem römischen Staat, als auch seinen Mitbürgern gegenüber (Cf. Gai. *inst.* 1, 1 *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur. Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis*). In der späten Republik wurde das *ius civile* vor allem dem *ius praetorium* gegenübergestellt. Prof. Hamza berief sich auf Cicero, bei wem Zivilrecht und das Recht des *praetor* den gleichen Status erlangen *(Caecin.* 34 *ex iure civili ac praetorio)*.

Ius civile und *ius praetorium* verschmolzen bis zur Zeit des Prinzipates, nachdem das *ius praetorium* seine innovative Rolle hinsichtlich des *ius civile* verloren hatte. Eine Unterscheidung zwischen diesen Kategorien wurde nur noch aufgrund ihrer Herkunft aufrechterhalten. Seitdem war das *ius civile* als Synonym des *ius privatum* zu verstehen, das die persönlichen, familiären Verhältnisse und Vermögensfragen der Bürger geregelt hatte. Als Gegenteil des *ius civile* war das *ius publicum* zu verstehen, das *„in sacris, in sacerdotibus, in magistratibus"* zum Vorschein kam (Ulpianus, D. 1,1,1,2). Diese Differenzierung ist in erster Linie bei der *iurisprudentia* von Belang, die eher als eine Art Klassifikation und weniger als Definition zu betrachten ist. (Cf. Ulp. D. 1, 1, 1, 2 *Huius studii duae sunt positiones: publicum et privatum. Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem; sunt enim quaedam publice utilia, quaedam privatium.*) Wie Prof. Hamza hervorhebt, sind das *ius publicum* nicht mit dem modernen öffentlichen Rechtsbegriff und das *ius privatum* nicht mit dem modernen Privatrecht zu identifizieren, da diese Rechtsbegriffe in einem völlig anderen gesellschaftlichen und wirtschaftlichen Milieu entstanden. Demnach stellte Gábor Hamza fest, daß die Trennung der Rechtszweige keine praktische Bedeutung für die römischen Rechtsgelehrten hatte, indem sie lediglich als eine Form der wissenschaftlichen Klassifikation erschien. Als Beispiel dafür erwähnte er den Erwerb von Eigentum: die Art und Weise, wie sich Staat und Bürger Eigentum erwarben, unterschieden sich voneinander. Der Staat brauchte zum Eigentumserwerb weder Manzipation noch Tradition. Im Gegensatz zum römischen Rechtssystem kann der Staat im modernen Privatrecht Subjekt privatrechtlicher Verhältnisse sein. Das *ius privatum* bezog sich nicht auf den römischen Staat. Prof. Hamza stellte ferner fest, daß während der eine Teil des römischen „Strafrechtes" – *crimen* – zum *ius publicum,* der andere Teil – *delictum* – zum *ius privatum* gehörten, wird das moderne Strafrecht im wesentlichen als Teil des öffentlichen Rechts betrachtet. Dies kann allerdings nicht verallgemeinert werden, da das Strafrecht z.B. im französischen Recht einen Teil des Privatrechtes bildet. Wie oben bereits angedeutet, stellte Gabor Hamza fest, daß die Trennung der Rechtszweige für die römischen Rechtsgelehrten keine praktische Bedeutung hatte. Die von Ulpian formulierte Distinktion ist nicht technischer Art, sondern dient der allgemeinen Klassifizierung, die im griechischen Denken wurzelt. Um das Fortleben des Begriffes zu illustrieren hob Prof. Hamza den berühmten Streit zwischen Placentin, dem Schüler von Bulgarus, und Azo Portius hervor: laut Placentin, der als erster die Trennung der Rechtszweige formuliert hatte, gelten das *ius publicum* und das *ius privatum* als *duae res,* und bilden somit zwei separate Gegenstände des *studium iuris.* Dagegen war Azo um die Einheit des Rechtssystems besorgt, und sah lediglich eine methodologische Orientation zwischen dem *ius publicum* und dem *ius privatum,* wobei er eine *diversitas rerum vel personarum* abgelehnt hatte.

Im nächsten Teil seines Vortrages machte Prof. Hamza darauf aufmerksam, daß die *Tres libri,* die letzten drei Bücher des *Codex Iustinianus* ausschließlich Regeln des öffentlichen Rechtes enthielten, welcher Umstand jedoch keine Schwierigkeiten für die weitere Entwicklung des öffentlichen Rechts mit sich brachte. Zu diesen Büchern schrieb Andrea Bonello da Barletta (1190–1273), ein ausgezeichneter Schüler der Bologneser Schule und Professor der von Friedrich II. 1224 gegründeten Universität von Neapel, Kommentare. Prof. Hamza hat außerdem die von Marino da Caramanico zwischen 1270 und 1278 geschriebenen Glossen erwähnt, die sich mit den *Tres libri* befassen. Bartolus de Saxoferrato (1313/14–1357) kommentierte in einigen seiner Traktate *(Tractatus repraesaliarum, Tractatus de tyrannia, Tractatus de regimine civitatis, Tractatus de statutis)* sämtliche Teile des *Corpus Iustinianus* und behandelte zahlreiche Fragen des öffentlichen Rechts, sowie die Problematik der weltlichen und kirchlichen Macht, des *imperium* und des *sacerdotium.*

Im nächsten Abschnitt seines Vortrags betonte Gábor Hamza, daß das Fehlen einer Gliederung des Rechtssystems in Rechtszweige in Rom der Entwicklung von *ius publicum* nicht hinderlich war. Er betonte, daß die Rechtsgelehrten – besonders in Deutschland – die Dogmatik und Terminologie des *ius privatum* als Ersatz verwendeten. Hierbei sollte man an Paul Laband und Georg Jellinek denken, die in beiden Rechtszweigen – im öffentlichen Recht und im Privatrecht – gleichmäßig sachkundig waren. Diejenigen, die die Dogmatik des öffentlichen Rechts in der deutschen Rechtswissenschaft des 19. Jhs. ausgearbeitet hatten, waren in erster Linie Experten des Privatrechts (so auch Georg Jellinek), dementsprechend näherten sie sich den Institutionen des öffentlichen Rechts eher von der Seite des Privatrechtes an, d.h. mit dessen Auffassungen und Terminologie. In Verbindung mit der englischen Rechtswissenschaft berief sich Gábor Hamza auf Sir Thomas Erskine Holland, der in seinem *„Elements of Jurisprudence"*, veröffentlicht in den 1880er Jahren, betont, daß *„the only typically perfect law"* nichts anderes sei als *private law.* An dieser Stelle bezog sich der Vortragende auf das Werk *„Constitutional History of England"* von Frederic William Maitland (1908 erschienen), in dem der Autor die Bedeutung des Privatrechts betonend wie folgt formuliert: *„Our whole Constitutional law seems at times to be but an appendix to the law of real property"*. Die Auffassung von Sir John Salmond, einem anerkannten Rechtsanwalt in Neuseeland, ähnelt der von Ulpian, laut wem *public law* vor allem Regeln hat, die *„in sacris, in sacerdotibus, in magistratibus"* zum Vorschein kommen. Gleichwohl ist das Begriffspaar *public law – private law* in den Rechtssystemen von *common law* bis zum heutigen Tag nicht gleich einer Trennung der Rechtszweige. In der französischen Doktrin bestritt Léon Duguit in seinem Werk *„Traité de droit constitutionnel"* die Gültigkeit der Trennung zwischen öffentlichem Recht und Privatrecht nach griechisch-römischem Muster, und behauptete, daß diese Unterscheidung nur klassifizierenden Charakter hat.

Der Vortragende hat anhand von zahlreichen weiteren Beispielen gezeigt, daß das römische Recht die Abgrenzung des öffentlichen Rechtes vom Privatrecht im heutigen Sinne nicht kannte, und wies – wie auch Azo – auf die möglichen Gefahren dieser Gliederung hin. Diese meist künstlich vorgenommene Untergliederung des Rechtssystems wirkt auf die Rechtsentwicklung nicht unbedingt förderlich, indem sie die Gefahr der Aufhebung der Einheit des Rechtssystems in sich trägt.

Mit Hinblick auf das universitäre Iurastudium hat der Vortragende besonders die, 1694 an der Universität von Halle errichteten vier Professuren (nämlich *Decretalis, Codex, Pandectae, Institutiones)* als richtungsweisend hervorgehoben, die nicht nach Rechtszweigen, sondern nach zu erforschenden und zu unterrichtenden Quellen *(fontes iuris)* organisiert wurden.

Am Ende der Sitzung überreichte der Vorsitzende Ádám Török Prof. Gábor Hamza die Urkunde über die korrespondierende Mitgliedschaft in der Ungarischen Akademie der Wissenschaften.

OVERVIEW OF THE DRAFT CIVIL CODE OF CHINA[1]

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I. Historical overview of the drafting of the Civil Code in China

Since the founding of the People's Republic of China, the country has experienced the framing of four civil codes. The first attempt occurred in 1956, but failed due to political reasons; the second one failed in the early 1960s for the same reasons. The third attempt took place in the early 1980s, when China's attempt to reform the economic system was still in its infancy. This was not the right time for the country to draft a completely new Civil Code, since it was in a state of transition from a planned to a market economy. Nevertheless, as the economic reforms deepened, it became urgent for China to frame a civil law to regulate the economy. Thus, the General Rules of Civil Law were adopted and the law came into effect on January 1, 1987.

The General Rules of Civil Law consist of the following sections: fundamental principles; natural and legal persons; legal acts; agency; civil rights; liability; the law of international civil relations and the appendix (156 articles in total). The rules remain extremely general, but they remain the fundamental law to this very day. In addition, there are some special civil law statutes, such as the Law of Contracts, which entered into effect on October 1, 1999, the Law on Guarantees, which entered into effect on October 1, 1995, and the Law on Marriage, which came into effect on January 1, 1981, and was amended on April 28, 2001.

The most recent draft of the Civil Code was completed in April 2002, by a group of legal experts. On December 23, 2002, the draft was submitted to the Ninth National People's Congress for debate. This proves that the fourth draft of the Civil Code achieved a certain degree of success, since this is the only civil code draft that was submitted to the legislative body in the history of the People's Republic of China.

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[1] China in this article refers to the People's Republic of China.

II. The structure of the new draft

The draft submitted to the National People's Congress consists of nine parts.

Part one: General Rules; Part two: Property Law; Part three: Law of Contracts; Part four: Law of Persons; Part five: Law of Marriage; Part six: Law of Adoption; Part seven: Law of Succession; Part eight: Law of Torts; Part nine: Application of the Law on Foreign Related Civil Relations.

Many experts have criticized this structure for being unscientific and lacking a certain degree of logic. In reality, however, it represents no more than a simple modification of China's current law. This is why another law was drafted by experts, who share the opinion that the German Civil Code should be taken into consideration. If the German Civil Code is followed, China's civil code will consist of the following seven parts: Part one: General Rules; Part two: Property Law; Part three: General Rules of Obligation; Part four: Law of Contracts; Part five: Law of Torts; Part six: Family Law; Part Seven: Law of Succession.

III. The fundamental principles of the new Civil Code

The draft of the Civil Code is intended to follow the fundamental principles established by the General Rules of Civil Law.

1. The parties concerned are to be equal.

2. Civil law should be guided by the principles of freedom of choice, equality, fair compensation and good faith.

3. Rights and interests of every natural or legal person should be protected by law, and cannot be infringed upon by any individual or organization.

4. Activities in civil law should be in accordance with the law or the policy of the state, should no concrete rule be applicable in the Civil Code.

5. Activities in civil law should meet the morality requirements and cannot harm the public interest.

IV. The characteristics of the new draft

1. China is a civil law country, which will typically follow the German way. The traditional system of legal activities, the separation of property rights from obligations, and the separation of the general provisions from the specific ones, can be found in China's civil law. The new draft on the Civil Code follows this method as well.

2. The draft follows the monist principle, which means that there is no distinction between civil law and commercial law. Companies, business partnerships, negotiable instruments and securities are not stipulated therein. These fall into the category of commercial subjects and commercial activities, and should be regulated by special legislation.

3. The law of intellectual property rights is not regulated in the draft, because it differs in many respects from fundamental civil rights, for example taking the duration of the protection, the way of protection into consideration.

4. International private law is regulated in the draft version of the Civil Code. Many experts agree on that it should be regulated by the Civil Code.

V. Some problems associated with the new draft

Though the new draft can be characterized as progressive, we must recognize that there are some problems with it as well. The time allocated for the actual drafting process was limited, we can even say that it was finished in a hurry. On the other hand, the procedure by which the drafters were appointed was simple, since no process was required in order to regulate the appointments. The drafting group was comprised of six professors, one retired judge and two officials. By comparison, in France, the civil code drafting committee is typically comprised of three law professors, three judges and three lawyers (including notaries). This is also referred to as the „three-three rule".

In addition, since China still does not have property laws, many experts and drafters have recommended that the Civil Code should be shaped on the basis of property law, which should be adopted first.

VI. Dissensions in drafting

1. Subjects of civil law

The General Rules of Civil Law of 1987 state that there are two kinds of subjects of civil law, i.e. natural persons and corporations. China has already enacted the Law on Partnerships, and this is why many experts share the opinion that partnerships should also be taken into consideration as the subjects of civil law.

2. Collective ownership

Some of the current questions are notably how to define the ownership of collective property, who is the owner, and whether this right is tenancy in common or condominium according to the share.

3. Transfer of the rural land usage right

Rural land can be land for building and land for farming. On this basis, naturally, the right to use rural land includes the right of usage for building and farming. The transfer of the former is forbidden, in order to prevent rural land from entering the market. This will bear an impact on the real estate market. Some experts think that the transfer of the right of usage for the purposes of building should be permitted in order to prevent damage to collectives and peasants. The latter right of usage is also referred to as a management right. In the meantime, the Law on Contracts Concerning Rural Land has come into effect, and this law provides that the peasants can re-contract, rent, exchange, or assign the right on the agricultural land. However, the law does not contain any regulations on mortgages. This is why experts suggest that the transfer of the land usage rights (including mortgages) should be regarded as an issue, which needs to be regulated in the Civil Code.

4. Should there be a general section on obligations?

There is no law of obligations in common law. Austria, Germany and Switzerland have a system of law of obligations, as well as Russia and the Netherlands. The law of obligations is at the heart of the German legal system. In China, most experts believe that the general rules of obligations should guide contracts and torts, but also general rules on contracts should be stressed. Those, who do not share this opinion, think that because the general rules of the Civil Code already govern contract law, there is no need for separate general rules of obligations. These critics have stated that the drafters should not have blind faith in the German legal system.

5. Should the right to privacy be regulated separately?

Firstly, let us examine the manner by which some other countries regulate the issue. Switzerland was the first to secure the right to privacy. Germany regulated the right to privacy in 1945, and consequently the law stipulated that he or she who suffers injury has the right to claim compensation in case of infringement of his right to privacy. Greece provided this right in 1964, and France adopted it in 1970. In China, people regarded civil law for a long time as the law of property, and even nowadays many people pay more attention to property law relations, than issues relating to personality rights. Many experts share the opinion that the right to privacy cannot be regulated in the Law of Persons section of civil law, and that the Law of Torts is not the appropriate place to regulate this problem either. This is why the right to privacy should be regulated by a separate section of civil law.

The right to privacy is a substantial right in civil law, and for the time being a separate paragraph refers to it in the General Rules of Civil Law. Nevertheless, many experts think that there are too many inherent difficulties related to the way in which the right to privacy is regulated. For example, only a few rules exist, which are capable of providing answers to problems related to this right, and many issues are hard to distinguish from tort-related problems.

6. Should torts be regulated separately from obligations?

In some countries, such as France, Germany, Japan and Switzerland, torts are not treated separately. Chinese experts think that there are many differences between contracts and torts, their rules relating to liability, for example, differ completely, just to name one important difference. This is why torts should be regulated separately from contracts, since otherwise the structure of the law of obligations would be damaged.

7. Should foreign-related civil relations be regulated in the Civil Code?

Most experts think that foreign-related cases are special, and that they should be regulated separately by international private law.

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